Pay

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Issues and Options

Ontario
Ministry of
Labour

ISSUES AND OPTIONS:

EQUAL PAY/EQUAL OPPORTUNITY

Papers presented at the Equal Pay/Equal Opportunity Conference sponsored by the Ontario Ministry of Labour, January 16th and 17th, 1978 at the Royal York Hotel, Toronto, Ontario.

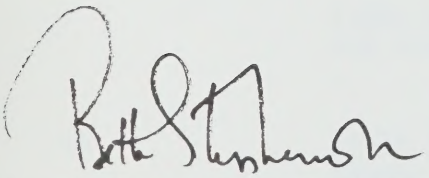
Ontario
Ministry of
Labour

The Ontario Ministry of Labour, responsible as it is for a female labour force of 1.6 million, considers the issues of Equal Pay/Equal Opportunity for women to be vital.

Discussion around these issues has been hampered in the past by a lack of co-ordinated information related to them. For this reason, the Ministry sponsored an Equal Pay/Equal Opportunity Conference in January, 1978, to bring together experts from Canada, the United States and the United Kingdom, to discuss their distinctive approaches to the problems of women in employment.

We are pleased to publish the papers presented by our distinguished guests. We intend to make this collection widely available.

The Ministry of Labour is grateful to all participants for their thoughtful contributions to the expanding pool of knowledge in the area of equality in all respects for women in the workplace.



The Hon. Bette Stephenson, M.D.
Minister of Labour

February 1, 1978

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OPENING REMARKS

by

The Hon. Robert Welch, Q.C.
Deputy Premier of Ontario and
Minister of Culture and Recreation

On behalf of my colleague, The Hon. Bette Stephenson, Minister of Labour, I am pleased to welcome you to the Conference on Equal Pay and Equal Opportunity. Dr. Stephenson is unable to join us for the conference, as she is attending a Federal Provincial Meeting of Labour Ministers in Victoria, B. C. She did ask me to express her regrets and her best wishes to all delegates for a productive conference.

The Ministry of Labour is deeply concerned about the issues to be covered during the next two days. This conference represents its commitment to address the problems of discrimination encountered by working women today.

As some of you may know, The Ministry of Labour, as part of its mandate, is responsible for enforcing Provincial Legislation dealing with Equal Pay and Equal Opportunity for Women. Three branches of the Ministry are involved on a daily basis with enforcement and educational outreach programs related to the legislation.

The Women's Bureau, although it does not enforce legislation, actively works to change discriminatory attitudes toward women in the workplace. It does this through an extensive program of research and public education, dealing particularly with such issues as legislation, vocational counselling and affirmative action.

The Ontario Human Rights Commission enforces The Human Rights Code, which prohibits discrimination with regard to terms and conditions of employment because of race, creed, colour, nationality, ancestry, place of origin, sex, marital status or age. As you are no doubt aware, The Commission recently undertook a review of the Code and has presented the Government with a report recommending changes to current legislation.

The Employment Standards Branch administers The Employment Standards Act, which establishes minimum work standards. The Ministry recently began a review of this Act, considering possible revisions. The Act currently provides for pregnancy leave and equal pay for substantially the same work

Ontario was the first Canadian jurisdiction to introduce Equal Pay legislation--27 years ago. The concept of equal pay for substantially the same work is now, with rare exception, generally accepted in Ontario and other jurisdictions.

However, Equal Pay for Equal Work provisions are obviously not effective in eliminating the so-called job ghettos. Each jurisdiction has taken a somewhat different approach to the challenge of providing equal career opportunity to men and women. This conference provides a unique opportunity to examine those approaches--the opportunities and the difficulties associated with each.

By sponsoring this conference, the Ministry hopes to provide a forum for informed discussion. The speakers are singularly qualified to discuss Equal Pay and Equal Opportunity programs. On behalf of Dr. Stephenson, I would like to express my thanks to each of them for participation in this conference. I would also like to thank members of the Ministry of Labour staff, particularly the Conference Planning Committee, for organizing this conference.

The Committee designed the Conference as a learning experience, both for delegates and for Ministry officials present. You will note in the agenda that time is set aside for questions from the floor. I hope that the formal addresses will stimulate your questions; feel free to pose them to the speakers.

I do not expect this conference to conclude with any formal public resolution. Far more important, I believe, is a personal resolution--a personal commitment by representatives of Labour, Management and the Government and by individuals to assist female members of the work force to achieve equal career opportunities.

I hope that this conference will provide each of you with a deeper understanding of progress to date toward that goal and a clearer definition of the challenges ahead.

Again: On behalf of the Government of Ontario, best wishes for a stimulating and productive conference.

EQUAL PAY IN ONTARIO:
CHALLENGES AND OPTIONS

by

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Ontario Ministry of Labour

No individual working to improve the status of women can fail to develop strong personal opinions as to the best solutions for the many problems facing women in the labour force. However, today, personal opinions aside, it is my responsibility to report on the present status of remedial efforts to improve the working conditions and remuneration of the 1.6 million women working outside the home in Ontario.

The concept that women should receive equal pay and equal opportunity in the work force is, as yet, not totally accepted by western industrialized societies. This is reflected in the many myths which still prevent women from achieving equality at all levels of society.

That married women, now 62 per cent of women in the Ontario labour force 1/ are essential to the work force and therefore the health of the economy, is a fact today often not accepted by those who suggest that married women should give up their jobs for male heads of families.

The Women's Bureau considered this myth in one of its Women in the Labour Force fact sheets. Here was our estimate of the situation.

> "In March, 1975, there were 866,000 married women in the Ontario Labour Force. At the same time, there were 176,000 unemployed men. If all the married women left the labour force and their jobs were taken by the unemployed men, 690,000 jobs would remain empty. In addition, most unemployed men do not have the education or the skills to fill many of the jobs held by married women, e.g., teachers, secretaries, nurses. 2/

Given the present instability of many marriages, it is difficult to imagine how society could define or control a woman's democratic right to work outside the home. Sole-support mothers, single, divorced and separated women, married women supplementing the low income of husbands or assuming the role of sole wage earner should husbands become unemployed, constitute a sizeable proportion of women in the labour force. Thus women are essential to our economy and work for the same reasons that men do - to earn money and to feel themselves an integral part of a society in which the work ethic is still strong.

The growing numbers of women in the work force in Canada are beginning to demand financial recognition of their contribution to the economic life of the country and greater opportunities to share in the decision-making processes which affect their lives.

Although the myth that women work for frills or from some perverse desire to create unemployment for men is strong in our society today, there have been some improvements in attitudes. In the 1968 equal pay case of Beckett versus The Sault Ste. Marie Police Commission the judge included the following in his summary:

> "He being a married man with a family to maintain and support, was paid at a rate somewhat higher than (the plaintiff) who was single and had no family obligations whatever..... She is not being discriminated against by the fact that she receives a different wage, different from male constables, for the fact of difference is in accord with every rule of economics, civilization, family life and common sense." 3/

Surely such a dogmatic statement would no longer be acceptable in 1978.

Ontario was the first jurisdiction in Canada to enact equal pay legislation in recognition of the financial inequities faced by women in the labour force. The Female Employees Fair Remuneration Act of 1951 stated that:

> "No employer and no person acting on his behalf shall discriminate between his male and female employees by paying a female employee a rate of pay less than the rate of pay paid to a male employee employed by him for the same work done in the same establishment."

However, the work performed had to be identical and there was no provision for back pay.

Various changes have been made both in the wording of the legislation and in enforcement since that time. There is now provision for the collection of back pay up to $4,000 for each employee. A significant improvement was made in 1968 which permitted the initiation of an investigation by the Employment Standards Branch without the filing of a specific complaint. Decisions of the Ontario Court of Appeal in the Greenacres case of 1970 and the Riverdale Hospital case of 1973 broadened the interpretation of equal pay for equal work to include work which was " substantially the same." In 1975, the legislation was changed to reflect those judicial decisions.

In that same year, a study was begun in the Ministry of Labour to consider legislative changes in response to the International Labour Office Convention 100 ratified by Canada in 1972, which requested governments to move towards equal value legislation. Following study and research a comprehensive discussion paper, Equal Pay for Work of Equal Value, was published and distributed throughout the province. Interested organizations and individuals have been asked to respond to issues raised in the paper. Some organizations have responded to the paper and others have indicated that they are preparing briefs for the Ministry's consideration.

This paper will briefly consider the enforcement status of present equal pay legislation, the equal value concept, suggestions for improving present legislation and some options for future consideration.

Enforcement

Since 1973, a total of $617,084.03 has been collected in back wages for women doing substantially the same work as male counterparts in the same establishment, based on the criteria of skill, effort, responsibility, and working conditions. However, there has been no discernible improvement in overall male/female salary differentials within and between occupational categories. In fact, there are indications that differentials are growing.

There are two major obstacles which have prevented improvements in this situation. The first major obstacle is the occupational distribution of women in the labour force. 63.5 per cent of all female workers are clustered in sales, service, and clerical areas, contrasted with 27.1 per cent of all males.

These occupations have traditionally been under-valued and poorly-paid. The considerable numbers of women available for such employment also creates a large labour pool so that wages tend to remain depressed in those areas. Present legislation does not assist such women since there are few men in these occupations and , therefore, equal pay for substantially the same work does not apply. Such traditionally "female" jobs have been viewed as extensions of the female role of wife and mother, supportive and nurturing functions, and not considered as significant jobs in their own right and essential to the work force.

The second major obstacle to enforcement is the employee's fear that the filing of a complaint may lead to harassment. Although the legislation prohibits reprisals for any involvement in an equal pay case, apprehension still exists. This is particularly so for the female manager or professional who is usually the only employee involved in an alleged violation. In some cases brought to the attention of the Women's Bureau, the differentials have been as high as $10,000. Yet such women are legitimately concerned about future career opportunities. Most of the successful equal pay cases have involved groups of women in a single category, which provides greater security for the individual employee. Cases involving orderlies and nursing assistants in hospitals, or cleaning men and women in large offices, have been the most amenable to complaint and successful resolution.

Equal Value

The major thrust for legislative change urged by organizations, civil rights groups, organized labour and others in Canada has been for the enactment of equal value legislation. Briefly, equal value legislation would enable comparison of pay rates between men and women working in dissimilar jobs where it can be shown that such jobs involve substantially the same skill, effort and responsibility and are performed under similar working conditions. The demand for this change has been consistent across Canada and provides an interesting contrast to the situation in the United States where there has been no strong pressures for changes in their equal pay legislation. Affirmative action legislation covering all minorities was mainly the result of the demands of the civil rights movement in the United States. Thus, women were included as only one of the minorities under the legislation. Since racial tensions have not been as widespread or intense in Canada, the major demand for change has tended to be focused on the status of women. Perhaps the historical differences explain to some extent the great concern expressed about male/female wage differentials in Canada and the demands for equal value legislation as the popular solution. In response to such demands the federal government is now well on the way to enshrining the equal value concept into its new Human Rights Act. Provincial jurisdictions will be following the implementation of equal pay for work of equal value with great interest when that section of the Act is proclaimed this year.

Difficulties in the implementation of equal value legislation have been well documented in the Ontario discussion paper. Further governmental intrusion in the market place, the limitations of present job evaluation, increased costs to the employer, increased enforcement costs to government, interference in the collective bargaining process, implications for the allocation of labour among industries, employers and regions are all issues which are carefully considered in the paper. Although these are significant areas for research and discussion, it should be noted that many of the difficulties outlined are also factors in the enforcement of present equal pay legislation.

The relatively small number of cases has tended to lessen the impact of these considerations. However, adequate enforcement of equal pay for substantially the same work also involves interference in the market place, increased costs to governments and employers, interference in collective bargaining, and possible labour allocation problems. Thus, moving towards equal value legislation is, to some extent, a matter of degree, a further development whose total impact is difficult to predict. It would appear that the critical factors are the need for extensive job evaluation systems, effective guidelines for non-sexist job evaluation plans, and an adequate method to assess job analysis and evaluation systems. This is the area which requires research and a public education program. The Research Branch of the Ministry of Labour will be examining the effects of job evaluation on male/female wage differentials. The study will include the extent to which job evaluation has affected specific occupations and the wage structure in establishments. It will also examine the extent and reasons for differences and inconsistencies between job evaluation ratings or rankings and the actual wage structure.

The Women's Bureau is interested in developing non-sexist guidelines for job evaluation plans and will be encouraging employers and employees to examine their plans for possible sex discrimination.

Although action is being taken in both research and public education, no final policy decisions have been made by the Ontario government in this area.

Legislators must be aware of rising levels of expectation focused on a single legislative solution to a serious economic problem which must be solved. Without question, increasing numbers of women are joining the labour force. Almost one out of every two women in Ontario is working outside the home. An increasing percentage of these women have long range plans for a permanent attachment to the labour force and will be seeking a greater share in the economic benefits of such participation, both in terms of salary and status. Some of the enforcement problems we are now experiencing with equal pay legislation such as the fear of harassment, will still be evident as governments move toward the equal value concept. In two to three years, if male/female differentials remain the same for female employees under federal jurisdiction, the level of cynicism about legislative solutions will greatly increase.

Surely, if the drive is toward legislative solutions to the second-class status of women in the work force, our considerations must be broadened to include not only equal value legislation but other alternative or additional legislative options.

Equal Pay Legislative Improvements

The enforcement of present equal pay legislation can be somewhat improved by some minor changes. First, a re-definition of what constitutes an "establishment" could provide broader coverage. The present definition of"establishment" covers only one specific geographic location so that an employer with several establishments need only respond to equal pay settlements in one branch of company operations.

Another area where enforcement could be improved is in the case where a woman is hired to replace a man, assumes the same job responsibility but is paid less than her male predecessor. A "consecutive employment" clause could cover this specific problem.

A third area under consideration is the right of appeal. Employers have a right to have a decision that they are guilty of violating the equal pay provisions reviewed by a referee. At present this privilege is not extended to the employees, although they do have a right to an internal review by the Ministry if the decision is that there was no violation. However, such suggested changes are certainly worth investigation by all jurisdictions to ensure that the present legislation is as effective as possible.

Equal Employment Opportunities

Although equal value legislation demands serious attention, the equal value concept by itself cannot solve the long-term necessity for equal status and employment opportunity for women. Other legislative alternatives deserve consideration.

Contract compliance is a legislative measure designed to increase employment opportunities and advancement for female employees and other minorities in organizations tendering for government contracts. It is a relatively straightforward measure which can include clear guidelines covering specific requirements. Organizations could be required to file an affirmative action plan which would then be approved and monitored by a compliance agency. Limits could be established to specify the size of contract which would require compliance procedures. Ongoing and long-term government-funded organizations, such as educational institutions, could be excluded from initial compliance, thereby enabling the compliance agency to gain evaluation and enforcement experience with organizations seeking single contracts of limited duration.

Such a measure could begin to change the occupational balance of the labour force through the planned establishment of goals and programs designed to hire women in all occupational categories and to increase the numbers of women in decision-making roles. Certainly research is required to establish reasonable guidelines so that sufficient numbers of women will be affected by the legislation. It could also be expected that other organizations, not directly affected by contract compliance, would face competition in hiring women, thereby improving the hiring and promotion of working women in all organizations. In 1974, an affirmative action program was initiated to raise the remuneration and occupational levels of female civil servants in Ontario. The Women Crown Employees Office in the Ministry of Labour co-ordinates the efforts of Women's Advisors in twenty-eight ministries crown agencies and boards. Considering that an effective affirmative action program requires three to five years to indicate visible achievements, 4/ some changes have occurred particularly in opportunities for training and the broadening of the occupational range for women in government.

The Women's Bureau has been providing an Affirmative Action Consulting Service to employers for the past two years. Resources and expertise have been offered to 245 employers and, at the request of senior management, consultants have met with over 160 companies assisting in the design of programs to utilize the full potential of female employees.

A sound affirmative action plan requires not only the identification, training and promotion of competent women but also must encourage a more representative mix of males and females in all job categories. The horizontal movement of women into a wide range of traditionally male occupations should tend to decrease the male/female wage differentials.

At the end of this fiscal year, the Bureau's voluntary approach will be evaluated as comprehensively as possible, given that it is a voluntary program and employers are not required to provide data. However, a survey study should enable the Bureau to consider the efficacy of the voluntary program. The expertise gained since 1975 will certainly be valuable, whether the program continues to be voluntary or whether legislative measures are enacted. In fact, the voluntary program would still be necessary since many organizations would not be covered by contract compliance as outlined in this paper. Such legislation could remain a limited program of affirmative action or could be broadened to cover all employers and all minority groups, as in the United States.

The development of tax incentives to encourage equal opportunities in the work force is another option which should be investigated. Such a measure would seem to apply most effectively to encourage better human resource development through educational and training opportunities. Tax rebates could be given to employers providing equal opportunities for male and female staff to participate in career-related training programs, including management seminars and conferences. Although this is only a minor suggestion for the utilization of tax incentives, other approaches could be considered by individuals knowledgeable in the field of taxation.

Conclusion

Although this paper has concentrated on legislative solutions, it cannot be forgotten that public education must be continued by governments, voluntary organizations, and interested individuals if we are to change outmoded attitudes towards women in the work force, home, and the community.

The best approach to solving the serious problems faced by women in the work force is surely a combination of public education and sound legislation, effectively enforced.

FOOTNOTES

1. Women's Bureau, Ontario Ministry of Labour, Women in the Labour Force, " Basic Facts", 1975

2. Women's Bureau, Ontario Ministry of Labour, Women in the Labour Force, "Fact and Fiction", 1975

3. Ontario Law Reports, 1968, Vol. 1, pp. 633-642

4. J. Bennett, "Equal Opportunities for Women: Why and How Companies Should Take Action", The Business Quarterly, London, 1977, P. 28

EQUAL PAY FOR WORK OF EQUAL VALUE: THE NEED TO EMPHASIZE THE SERIOUSNESS OF THE PROBLEM RATHER THAN THE CERTAINTY OF THE SOLUTION

by

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Introduction

The September, 1977 issue of the Labour Gazette has a cartoon which shows a despondent looking female standing in front of the desk of a middle-aged male manager who appears to have lost his patience, and is quoted as saying, "If you want a man's wages, Miss Philpot, why don't you get married?" This cartoon provides the best introduction that I know of to the subject of equal pay for work of equal value. The caption on the cartoon reflects what I believe to be a fairly widespread attitude of both males and females regarding the rationing of well-paying jobs. While this attitude may be only slightly perceptible in good economic times, it is likely to be far more prominent (if still largely covert) when employment prospects are generally less encouraging. 1/ It is not difficult to imagine the feelings of anger and frustration that can build up after several experiences of the type depicted in the cartoon. 2/

Such feelings of anger and frustration provide much of the force behind demands for meaningful social action towards achieving equal pay for work of equal value. To confront these feelings with only inconclusive statistical analyses, abstract discussions of the meaning of value, or technical critiques of job evaluation is to embark on a course of mis-communication which can give the impression that one is not really serious about responding to the problem. On the other hand, it seems unlikely that solutions can be found easily for a problem which is rooted in generations of culture and tradition, and reinforced by extensive social institutions. These remarks are not to suggest that innovative policies for reducing sex-related inequities in pay cannot be found, nor that there is no role for technical analysis. What I am suggesting is that most of the debate on equal pay for equal value thus far has been non-constructive, because one side in the debate has been concentrating on the need for action while the other side has focussed mainly on the potential costs of only partially elaborated proposed solutions. So long as the debate stays on this plane, a stalemate is likely to persist; with proponents of various schemes for equal pay for work of equal value doubting the genuineness of those who question the schemes, and the latter regarding the former as naive about how the economy and the labour market work. 3/ What is needed to move beyond this stalemate is a common meeting ground of shared assumptions between those who claim to have solutions and those who press for considerable amounts of data collection and analysis before anything else can be done. The most appropriate such meeting ground and starting point for action on equal pay for work of equal value is a common appreciation of the problem to which this concept is addressed.

Appreciating the Problem

The problem to which the concept of equal pay for work of equal value is addressed, can be formulated in either of two ways. One way is in terms of observed differentials in earnings and rates of pay between males and females; the other is in terms of inequalities of pay for jobs that appear to be of approximately equal value.

Female-Male Earnings and Pay Differentials

Let's consider what looks to be the more concrete formulation first. It is well known that there are substantial differences between rates of pay for men and women. Data from the 1971 Census of Canada show that the average annual earnings of all female workers in Ontario was about 46 percent of that for male workers. 4/ For full-time, full-year workers only, the ratio was 58 percent. Surprisingly, only a small portion of this more than forty percent differential is explained by differences in occupational distributions between males and females among major occupational groups (such as clerical, service, machining, construction, etc.) Statistically speaking, the ratio of female to male average annual earnings would be increased to 66 percent if female employment had the same occupational distribution as that for males among major occupational groups. For purposes of analysing sex-related pay differentials, census data have a number of serious limitations. The data are in terms of quite broad occupational classes or groups; the occupations and earnings are self-designated; information is on total earnings, not rates of pay; and no account is taken of differences related to seniority, industrial and market structures, establishment size, company policy, unionization, or location.

Many of these data deficiencies are overcome in the other principal source of occupational data on female-male pay differences, the Labour Canada Survey of Wages and Working Conditions. This source provides data on rates of pay in a number of more narrowly defined occupations within establishments. 5/ Data from the 1974 survey show substantial variation in female-male pay ratios. For 625 calculations of such ratios for arbitrarily selected occupations (such as medical lab technician, bookkeeper, computer programmer) in establishments in Toronto, Ottawa, and Thunder Bay, the ratios ranged from 0.35 to 0.79 in 155 cases; from 0.80 to 0.99 in 355 cases; and 1.00 or greater in 112 cases. 6/ On average, for the arbitrarily selected cases reported in the Labour Canada Survey, the pay differential between females and males was about ten to twenty percent. Analysis of these differentials suggests that substantially lower than average differentials are associated with larger establishments, unionization, certain regions, and incentive pay systems. 7/ The Labour Canada data do not allow estimation of the effects of seniority, education, or specific work assignments within occupations. From the point of view of implications for equal pay for work of equal value, the most serious limitation of the Labour Canada data is that it is available only for arbitrarily selected occupations in establishments in selected cities. Further survey research is necessary to indicate the proportion of the overall pay rate differential which is explained by differences in the distributions of females and males among narrowly defined occupations. 8/ If it were found that such differences in occupational distribution accounted for a substantial proportion of the overall pay rate differential, then equal pay for work of equal value might contribute significantly to reducing the overall pay rate disparity between males and females - to the extent that jobs with different rates of pay were deemed to be of equal value. This leads to the alternative formulation of the problem, expressed most simply as unequal pay for work of equal value.

Unequal Pay for Work of Equal Value?

In introducing this formulation of the problem, it may be useful to emphasize briefly the distinction between equal pay for equal work (EW) and equal pay for work of equal value (EV). The thrust of legislation in this area in Ontario has been EW, although the notion of what constitutes equal work has been broadened significantly since the initial legislation. 9/ The essence of EV, in contrast to EW, is to allow comparisons between jobs that do not involve similar types of work, e.g. between sewing machine operators and maintenance workers. One of the principal motives for wishing to make such EV comparisions is a concern over the inability to achieve greater reduction of female-male wage disparities through EW legislation. A related motive is based on the intuitive feeling that the value - in terms of such things as skill, effort and responsibility - of many lower paid jobs performed mainly by women is as great as the corresponding value of many higher paid jobs performed mainly by men. The concept of value, in the sense used here, is not the outcome of the application of any single objective system of measurement, for no such system exists. However, the fact that we cannot measure the extent of the problem of unequal pay for work of equal value - as we can measure unequal pay for equal work - does not mean that the problem doesn't exist or can't be addressed. Many of the most serious of human problems similarly elude measurement.

It should be obvious that the concept of value is by its very nature highly subjective. If large numbers of people feel strongly that market determined wage differentials between males and females are inequitable, then there is an inequity problem. When dealing with such feeling, to say "come back when you have adequate data to define the problem" is not a meaningful response. A more constructive response is to accept such statements about inequity for what they are- expressions of feelings and descriptions of perceptions; to try to empathize with them; and to explore what can be done to remedy the situation. Such a response establishes a common ground of acceptance of the seriousness of the problem.

The Need For Experiment

Accepting the seriousness of the problem still leaves the question as to how one responds to a problem that is defined so subjectively and imprecisely? Two elements necessary in any response are commitment to amelioration of the problem and humility regarding our knowledge of what effect various proposals might have. The importance of these elements in social problem-solving has been the subject of a brilliant article by Donald Campbell entitled "Reforms as Experiments" 10/ Campbell's theme is that most social policies are advocated as though they were certain to be successful. This has two very undersirable consequences.

First, it makes it very difficult for reforms to be introduced, because in most cases it is impossible to say, in advance, whether a specific reform will be successful. If reforms could be advanced as experiments this impediment would not exist.

The second consequence, and the one which Campbell emphasizes, is that most ameliorative programs end up with no meaningful evaluation. Since reforms are introduced as certain solutions, there is apathy about evaluation. Additionally, with reforms being introduced as solutions, an evaluation of the reform is really an evaluation of the effectiveness of the administrators who are charged with implementing the solution. It is almost inevitable that when placed in such a situation, administrators will attempt to limit the evaluation to those outcomes which they can control directly. In this kind of situation, honest administrators will prefer evaluations to be relatively less open and more ambiguous than would be the case in a experimental setting. In policy areas such as equal pay for work of equal value, where, as we have seen, it is extremely difficult to define specific outcomes, this situation could easily work to prevent any interpretable evaluation.

What Campbell advocates is a shift in political posture from the advocacy of specific reforms to the advocacy of the seriousness of the problem, and hence to the advocacy of persistence in alternative reform efforts should the first one fail. 11/ Campbell goes on to emphasize the need for experiment and repeated experiment in developing successful social reforms. He argues that too many social scientists expect single experiments to settle issues once and for all when the significant experiments in the physical sciences usually have been replicated hundreds of times. Yet because social sciences provide far less opportunity for "experimental isolation" and because the treatment effects are likely to interact significantly with a wide variety of social factors many of which are"unmapped", there are much greater needs for replication of experiment in the social than in the physical sciences. In emphasizing the concept of experiment here, I should point out that I am using the term "experiment" in its broadest sense, to include open-ended, qualitative, subjective and even dramaturgic elements of evaluation rather than merely the narrow "contrived" laboratory model. Most of the criticism of the experimental approach to evaluation of social programs has, in my view, been misplaced, as a result of taking far too narrow a view of what constitutes an experiment. 12/

The Principle of the Middle Axiom

After making a commitment to an experimental approach to equal pay for work of equal value, it is necessary to develop the first specific policy alternatives for dealing with the problem. How does one go about developing policy alternatives for such an apparently intractable problem? A useful perspective on this question, and one which is consistent with Campbell's approach, is provided by E.F. Schumacher's "Principle of the Middle Axiom". 13/ For Schumacher, most human problems arise from the conflict between order and freedom. Order is used by Schumacher to connote planning, predictability, central control, discipline, obedience, and so on, without which nothing fruitful could be sustained because things would tend to disintegrate. Yet without the freedom in disorder there could be no risk-taking, release of creative imagination, and innovation.

In these terms one might say that the existing wage structure lacks order; it reflects thousands of actions by employers and employees loosely connected through market forces with insufficient central discipline to ensure conformity to a particular view of what the relationship among the rates of pay for various jobs should be. One way of altering relationships among these rates of pay, is through orders from a central source (i.e. the government). This approach conjures up notions of substantial government intervention in the collective bargaining process (perhaps more than the Anti-Inflation Program), and of possible negative effects upon the allocation of labour. In addition, an approach that leans too heavily on the order principle may not be effective for a problem where systematic measurement is not possible and where the high degree of subjectivity precludes standardized outcomes. What is needed is an approach that lies in between the present way that wage differentials are determined and the order principle, or in Schumacher's words, a middle axiom, "an order from above which is yet not quite an order". 14/ The example of a middle axiom which Schumacher relates in Small is Beautiful pertains to the National Coal Board in Great Britain, where the centre found a way of achieving more concentration of output in operating units by going beyond mere exhortation without diminishing the freedom and responsibility of the operating units. (As an aside, it is interesting to note the similarity in form between this middle axiom for coal production in Great Britain and affirmative action programs in employment for women and minorities in North America, especially including the use of "impact statistics"). Schumacher observes that it is easy to preach or issue regulations, but a far more considerable achievement to discover a middle axiom.

Towards a Middle Axiom for Equal Pay for Work of Equal Value

Without claiming such a considerable achievement, I should like to make a few comments about the likely ingredients of a middle axiom for equal pay for work of equal value. I believe that any effective approach must begin with an acceptance of the highly subjective nature of the problem and the need to force management and employees to reflect upon - and probably discuss together - the equity of existing female-male pay differentials in the establishment. In this process, good data will be helpful as may be the techniques of job evaluation. However, the problem is less a technical one than a moral one, and therefore the potential contribution of job evaluation should not be exaggerated. Job evaluation will not produce normative answers to questions as to what the wage structure should be, although it may assist the people in an establishment in systematically reaching a consensus regarding relative wages for different jobs held by males and females.

It is difficult to imagine a middle axiom which does not involve some dialogue between management and employees in an establishment, if not considerable participation of employees in decisions regarding relative wages. Such participation would facilitate a more creative approach to the problem than one which consisted merely of limited response to a series of individual complaints. The existing collective bargaining process - where it exists- would likely provide an excellent arena for such participation.

Additionally, it may be worthwhile to consider encouraging or requiring establishment-level equal pay for work of equal value committees which would be similar to plant health and safety committees.

One of the chief benefits of this approach would be the progress toward workable definitions of the problem of unequal pay for jobs of equal value in the context of an establishment, which is the level where the concept is most meaningful. In some establishments, the parties involved may, after examination and discussion, conclude that they do not have a problem. 15/ If they do identify a problem they will be able to zero in on it and begin to develop solutions that fit their work environment. A participatory approach would appear to provide good potential for dealing at the establishment level in terms of what the establishment "can afford" with the trade off between the amount and speed of progress toward EV and the costs (including possible disemployment effects) involved. This is so because the costs would be likely to vary greatly among establishments.

Let me conclude with a few words about costs and their role in the debate on equal value. The word "cost" has been something of a red flag in discussions of equal pay for work of equal value. I believe that potential costs are a valid consideration, and one can legitimately, and in good faith, acknowledge that there may be costs, while still supporting measures to advance equal pay for work of equal value.

There are a variety of potential costs, including those of wage realignments, impediments to recruiting the most able staff, and adminstrative costs. The latter will include both the opportunity cost of the administrators' time (which will be less available for other activities) and any paid time of employee participation, as well as the costs of in-house staff or consultants who assemble and analyze data and structure the process. Costs may be large or small depending upon the procedures adopted and the extent of the problem identified. Most employers probably would not take on such costs in the absence of some type of politically instituted commitment and government-backed action. For this reason, it is unlikely that there will be significant progress in the direction of equal pay for work of equal value without strong government action, including provision of adequate resources, and possible legislation. Whether there will be the necessary mandate from the public for such government action, will depend upon whether there is a common base of understanding of and commitment to the problem among labour, management, women's groups, and the general public; and whether an acceptable and effective middle axiom can be found. 16/

FOOTNOTES

1. The point has been made frequently that advancement of women in the work force is more difficult at a time when job opportunities are not increasing fast enough to supply jobs for all persons who want them. However, even in 1973-74 when the ratio of job vacancies to unemployment was at a record high in Ontario, and substantial recruitment abroad was taking place, there was a surprising degree of underutilization of the female labour force, see M.L. Skolnik and F. Siddiqui, "The Paradox of Unemployment and Job Vacancies: Some Theories Confronted by Empirical Evidence," Industrial Relations, Vol. 31, No. 1, 1976, pp 32-55. For an interesting analysis of the problem of competition between males and females for limited job opportunities and an examination of some alternative solutions, see Rosemary Reuther, "Working Women and the Male Workday: Towards New Solutions", Christianity and Crisis, February 7, 1977, pp 3-8. Professor Reuther emphasizes the need for greater work sharing between the sexes as an approach to competitive employment problems as well as other feminist concerns: "the pattern of over-worked husbands and under-stimulated wives could be changed in a real and systematic way to one of mutually shared work and home lives."

2. See for example, Louise Kapp Howe, Pink Collar Workers: Inside the World of Women's Work, Longman Canada Limited, 1977.

3. The most frequently heard criticism of proposals for equal pay for work of equal value is that they are uneconomic. As E.F. Schumacher has observed, "in the current vocabulary of condemnation there are few words as final and conclusive as the word uneconomic.... Call a thing immoral or ugly, soul destroying or a degradation...., a peril to the peace of the world or to the well-being of future generations; as long as you have not shown it to be 'uneconomic' you have not really questioned its right to exist...." Small is Beautiful, ABACUS edition reprint, 1977, p. 34.

4. This figure and much of the other data cited in this paper are taken from Equal Pay for Work of Equal Value: A Discussion Paper, Ontario Ministry of Labour, October, 1976, which contains a very detailed discussion of the problem as well as an examination of pertinent data. The data presented in the Discussion Paper and in this paper pertain only to occupational earnings and pay rates. Other data on income distributions in aggregate or on hourly earnings in manufacturing indicate that differentials, at least in absolute terms, have been widening. See Lynne McDonald, "Wages of Work: A widening Gap between Women and Men", Canadian Forum, April-May, 1975, pp 4-7.

5. Still however, employees in the more narrowly defined occupations in the Labour Canada survey do not necessarily perform 'substantially the same work', as defined in the Equal Pay for Equal Work section of The Employment Standards Act of Ontario. Consequently, male-female pay differentials within these occupations do not necessarily imply violations of The Employment Standards Act, although such violations are often alleged in newspaper stories each year when the survey results are released.

6. Equal Pay Discussion Paper, p. 24. The criteria used in calculating these ratios are discussed at length on p. 22 of the Discussion Paper.

7. Gunderson showed that unionization accounted for about a ten percent reduction and incentive pay systems an eight percent reduction in the differentials. M. Gunderson, "Male-Female Wage Differentials and the Impact of Equal Pay Legislation", Review of Economics and Statistics, November, 1975, pp. 466-468.

8. The lack of such data appears to be due at least in part to the very high costs involved in obtaining comprehensive data on occupational wage rates.

9. In 1975, for example, the phrase "substantially the same work" was inserted into the Act in order to avoid the necessity of proving that the work of men and women was identical. That there is a great deal of ambiguity regarding the difference between equal pay for equal work and equal pay for work of equal value is illustrated by the fact that many countries use the phrase equal pay for work of equal value to describe legislation that is quite similar to Ontario's present equal pay for equal work legislation. (Equal Pay Discussion Paper, pp. 45-48).

10. Donald T. Campbell, "Reforms as Experiments", American Psychologist, April, 1969, pp. 409-429. The author is indebted to Professor William Alexander of the Ontario Institute for Studies in Education for bringing to his attention the relevance of this article.

11. Campbell, p. 410 - The need for such persistence is demonstrated in some of the setbacks in the progress of affirmative action programs in universities in the United States after an initially promising start. See Marilyn Gittel, "The Illusion of Affirmative Action", Change, October, 1975, pp. 39-43.

12. A good example is the article by Robert S. Weiss and Martin Rein, "The Evaluation of Broad-Aim Programs: Experimental Design, Its Difficulties, and an Alternative", Administrative Science Quarterly, Vol. 15, 1970, pp. 97-109. The authors present an excellent critique of an inept application of evaluation of particular social programs but do not, in my view, succeed in invalidating the concept of experiment as applied to social programs.

13. E.F. Schumacher, Small is Beautiful, pp. 208-211. Schumacher's Principle of the Middle Axiom is presented in the context of a theory of large-scale organization where it applies to the relationship between the centre and the various functional units. The principle is here given an analogous application to public policy in terms of the relationship between the political centre and the social units affected by particular public policy.

14. Small is Beautiful, p. 210.

15. In some establishments there may be little feeling that there is an equal pay problem, and the parties might conceivably decide that the issue is not worth pursuing.

16. The Government of Canada appears to be ahead of the Provinces in terms of legislative embodiment of the principle of equal pay for work of equal value. The Canadian Human Rights Act which received Royal Assent on July 14, 1977 contains a section which states that "it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value." It states further that "in assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of skill, effort, and responsibility required in the performance of the work and the conditions under which the work is performed." However, this section has not yet been proclaimed and there is little indication thus far as to how it would be implemented.

    The federal jurisdiction, to which this Act would apply, is much smaller, less varied, and generally more sophisticated than the provincial jurisdictions. From an experimental point of view, there is much to be said for the provinces taking a different type of approach to equal pay for work of equal value and for rigorous longitudinal studies to be undertaken of comparable establishments in federal and provincial jurisdictions in order to evaluate the alternative approaches. A great deal has been learned about the effects of various social policies in the United States through comparison across states with differing legislation, e.g. on the effects of compulsory arbitration laws on strike activity or on the effects of occupational licensing. The Government of Canada can make a great contribution to the advancement of equal pay for work of equal value if, simultaneously with proclaiming the relevant section of The Canadian Human Rights Act, it establishes comprehensive plans for evaluation, preferably in cooperation with the provinces.

EQUAL PAY AND EQUAL OPPORTUNITY

IN GREAT BRITAIN

by

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The movement for women's rights in Great Britain was over 100 years old before The Equal Pay Act of 1970 reached the statute book. Throughout this time, the movement had been developed and supported mainly by professional and middle class women assisted by a small number of dedicated men, of whom John Stuart Mill is the best known. Much attention had been devoted to the creation of educational opportunities for girls in schools and universities and to establishing the right to vote. Less emphasis was placed on economic and social rights, though the activities in both world wars demonstrated to society at large and to women themselves how unjustifiably restricted women's accepted place in the world of work had been. But although the Trade Union Congress passed a resolution in 1888, accepting the principle of equal pay for equal work, mass support for women's rights did not arise until the nineteen fifties when, as the result of pressure from women in the Civil Service Unions, equal pay was established in the civil service and in teaching.

In the sixties, the movement gathered mementum. Developments in the United States stimulated interest. British legislation to prevent discrimination on grounds of race or ethnic origin prompted the question "Why not on grounds of sex?". The widespread acceptance and use of birth control led to an upsurge in the activity rates of married women. Whereas in 1921 only 8.7 percent of married women were economically active, by 1971 the figure had risen to 42.2 percent. Trade union support for equal pay became more active. When Barbara Castle was Secretary of State in the Department of Employment she took the initiative. In 1970, in the last weeks of the Labour Government, which fell in June 1970, The Equal Pay Act was passed.

Even as the bill was going through Parliament some of its important limitations were recognised. Robert Carr, the Shadow Minister for Employment and Productivity voiced the view of many women's organisations when he said in the Second Reading debate that equal opportunity was of even greater importance to women than equal pay. Before The Equal Pay Act was on the statute book, a Labour backbencher, Mrs. Joyce Butler, had tried unsuccessfully to introduce a Private Member's Bill to gain statutory backing for equal opportunity. After The Equal Pay Act was passed, the drive for equal opportunities gathered in strength with the support of a wide variety of women's organisations, from the most traditional to the avant garde, and by 1973 all political parties were committed to some form of equal opportunity legislation. In 1975 the Labour Government passed The Sex Discrimination Act. This Act came into force at the end of December 1975 on the same date as The Equal Pay Act; five years having been allowed for implementation of The Equal Pay Act to enable employers and trade unions to make the changes that the Act required.

The Equal Pay Act 1970 and The Sex Discrimination Act 1975 are the legislative foundations of women's rights in Great Britain, though the important issues of maternity rights are covered under The Employment Protection Act of 1975. The Equal Pay Act set out "to prevent discrimination, as regards terms and conditions of employment, between men and women"

It contains a three-pronged attack on inequalities of pay. Collective agreements which contain any discriminatory element can be referred to the Central Arbitration Committee, which has the powers to require the removal of discrimination from the agreement. Where a job evaluation system is in force a woman's job is to be rated as equivalent to that of a man if, but only if, her job and the man's job have been given an equal value, in terms of the demand made on the worker under various headings (for instance, effort, skill and decision-making). Where a job evaluation is not in use - and there is no obligation on any employer to institute it - a woman is entitled to equal pay if she is on "like work with men". "Like work" is work "which is the same or of a broadly similar nature and where differences between the jobs are not of practical importance". In assessing the claim for "like work" regard is to be paid to the nature, extent and frequency of the differences between the woman's and the man's jobs. When like work is established it is still possible for an employer to maintain that there is a material difference between the circumstances of the men's job and of the women's job sufficient to justify differences in pay.

The Equal Pay Act covers terms and conditions of employment as well as pay and so includes all aspects of bonus payments, redundancy and fringe benefits such as sick pay. Retirement and pension rights are excluded but certain aspects of pension rights - though not the equalisation of the retirement age of men and women - have been covered in subsequent legislation.

The Sex Discrimination Act makes illegal certain kinds of sex discrimination and discrimination on the grounds of marriage. It applies to all aspects of employment except pensions and the limitations on sex equality implicit in the protective measures of health and safety legislation. This protective legislation is to be kept under review. Certain other exceptions are permitted in the Act including a list of conditions which constitute genuine occupational requirements necessitating the employment of a person of a particular sex. Ministers of religion are exempted from observation of the Act, as are midwives though provision is made under certain conditions for men to train as midwives. Employment in mines is also excluded.

The Acts do not provide for positive discrimination except in one potentially very important area. Under section 47 of The Sex Discrimination Act positive discrimination in relation to training is permitted where the number of people of one sex engaged in a particular type of work is comparatively small.

Another section of great importance is Section 1 (1) (b) which deals with indirect discrimination. Under this section an employer is discriminating if a requirement or condition of a job, though applying equally to both sexes, is of such a kind that one or the other sex is unable to comply with the condition and suffers as a result, provided the employer is unable to show that the requirement or condition is justifiable.

Important though the field of employment undoubtedly is, it is, rightly, by no means the only area covered by The Sex Discrimination Act.

A frontal attack on educational discrimination is included in the Act designed to ensure that girls receive education of a kind needed to equip them to take full advantage of the opportunities made available by the Act. Discrimination in relation to goods, facilities, services and premises is also covered but issues connected with taxation and social security are not.

To spell out the nature of discrimination and to ban such discrimination by Act of Parliament is the first and probably the most important step on the road to equality between the sexes. But in this field, perhaps even more than in many other areas where laws are passed to alter social practices, such legislation would be of declaratory value only unless accompanied by effective means of enforcement. In the British legislation, an individual who believes he or she may be suffering discrimination in the employment area can take the case to an Industrial Tribunal. Industrial Tribunals are not courts of law, but are Tribunals made up of men and women nominated by employers' associations and trade unions and presided over by a legally qualified chairman. They are widely used to settle cases in relation to unfair dismissals and redundancies, and are seen as the accepted channel for redress in employment matters. Where the case concerns the terms of a collective agreement it does not go to an Industrial Tribunal, but to the Central Arbitration Committee and such references can be made only by the Secretary of State of Employment or by one or both of the parties to the agreement, i.e. the relevant trade union and employers' association or employer. Cases other than employment cases are dealt with by the County Court in England and Wales and by the Sherrif's Court in Scotland. Cases heard at Industrial Tribunals are subject to appeal on points of law to the Employment Appeal Tribunal.

The Equal Pay Act relies on the Industrial Tribunals, and the Central Arbitration Committee and system of appeal for enforcement. The Sex Discrimination Act set up an Equal Opportunities Commission with the responsibility of working towards the elimination of discrimination, of producing equality of opportunity between the sexes and keeping under review the working of both The Sex Discrimination and The Equal Pay Acts. The Commission has power to carry out formal investigations for any purpose connected with the carrying out of its duties, subject to certain conditions laid down by the Act. The Commission, in carrying out an investigation, can require written information to be submitted and can also require any person to attend to give evidence. The Commission, if satisfied that discrimination is taking place, can serve a non-discrimination notice requiring the termination of that discrimination. The person discriminating can be required to inform the Commission of changes carried out. In the event of continued failure to comply with the notice, the Commission can under certain conditions refer a case to a County Court which can issue an injunction ordering the cessation of discrimination.

So much, in brief outline, for the content of the two Acts. Since they came into force just over two years ago, what has happened and what issues should now be raised regarding the means of achieving equality between the sexes?

Two years is a short period of time and any comment made at this stage can only be in the nature of an interim report. In making the following observations I am drawing on published statistics, on the Annual Report of the Equal Opportunities Commission, on the reports of published Court cases, (in particular the cases dealt with by the Employment Appeal Tribunal), and to a limited extent on a research programme to monitor the impact of the Acts, carried out at the London School of Economics and Political Science under my supervision and with the support of the Department of Employment, in 25 enterprises. What results have in fact been achieved in these last two years as a result of legislative changes and the establishment of the Equal Opportunities Commission?

As anyone working in this field and particularly anyone attempting to carry out research or to monitor developments in this area is very well aware, it is extremely difficult to isolate the impact of legislation from the many other variables affecting the position of women. In the last two years Great Britain has experienced by far the most serious recession for nearly fifty years coupled with an unprecedented level of inflation. Where very little new recruitment takes place it is impossible to say in what ways equal opportunity legislation has affected the employment of women. In the London School of Economics study there has in fact been more evidence of men moving into customary women's jobs than women moving into customary men's jobs. As women's pay levels have risen and redundancy has accelerated, a few men have been prepared to take advantage of their legal rights under the Act to accept a customary women's job. Similarly when counting the cost of equal pay - a subject much discussed before the legislation was passed - it appears that in relation to the huge additions to the wages bill arising from inflation and the high pay settlements of 1974, and early 1975, the extra cost of equal pay has hardly even been calculated. It is against this background of abnormal uncertainty that a tentative appraisal of the effects of the legislation must be attempted.

Figures of changes in pay, however they are interpreted, are available. In 1970, the year in which The Equal Pay Act was passed, women's average gross weekly earnings were 54.3 percent of men's average earnings. This figure rose to 61.5 percent in 1975 and to 64.3 percent in 1976. For hourly earnings, excluding the effects of overtime, women during 1970 were receiving 63.1 percent of the men's figure. This increased to 72.1 percent in 1975 and 75.1 percent in 1976. Despite this lowering in percentage differences, in cash terms the gap between women's earnings and men's earnings has in fact increased in this period rising from £13.7 in 1970 to £25.6 in 1976.

Gross figures of this kind raise more questions than they answer. Four comments can be made which perhaps throw some light on the situation portrayed by these national figures.

The years 1970-76 cover periods of very high wage settlements. In each of the years except 1972-73, the percentage increase in women's gross weekly earnings was higher than the percentage for men by 3 percent in 1970-71, by 5.3 percent in 1973-74, by 9.6 percent in 1974-75 and by 6.2 percent in 1975-76. But given the initial higher level of men's earning, a percentage increase of 28.4 percent for men in the year 1974-75, inevitably involved a very large increase in take home pay, much in excess of the amount taken by women, despite the women's larger percentage rise of 38 percent.

The large percentage increases for women undoubtedly were affected by The Equal Pay Act. But detailed examination of the way in which the legislation has been applied in enterprises has shown the The Equal Pay Act is so phrased that it is possible for employers to keep within the law and still make relatively small adjustments - ambiguities of job evaluation schemes, the interpretation of differences of practical importance when assessing 'like work' and the use of material differences where 'like work' appears to have been established have made possible a policy of 'minimisation' to which no legal objection can be raised.

Separate scales for the payment of women and men have been eliminated from collective agreements but not infrequently women receive the lowest level of pay allowed in the agreement, a level which is not in fact being paid to any men. Where the criterion is 'like work' and no'like work' exists, no further action can be taken. Women's frequent exclusion from shift work, supported by the continuation of protective legislation limiting women's hours of work, also contributes to women's inferior earnings, as does the unwillingness or inability of many women to work overtime.

But probably the most important single reason for the continuing differential between men's and women's pay is to be found in the continuing practice of job segregation, despite the requirements of The Sex Discrimination Act. In Great Britain, as elsewhere, women are traditionally concentrated in a relatively small number of jobs at the lower level of the employment hierarchy. So far, The Sex Discrimination Act has done little to alter this position. The Act, as it appears, has made little impact on employers, trade unions or women. Research findings suggest that there is widespread knowledge of the existence of The Equal Pay Act though accurate knowledge of its contents is less extensive. But knowledge of The Sex Discrimination Act is at a very low level indeed. This comment is supported by the small number of applications submitted to Industrial Tribunals where action was completed in the period December 20, 1975 to December 31, 1976. Applications under The Equal Pay Act amounted to 1,742 but under he Sex Discrimination Act there were only 243 cases and of these 59 came from men.

In attempting to assess the effectiveness of the legislation some analysis of the outcome of the cases brought forward is needed.

Of the Equal Pay cases brought forward, over 50 percent were withdrawn; a minority because settlements were reached privately and the rest for reasons unknown. In part this reflects the ignorance of the legislation leading to cases which never had a chance of success for the complainant. Such faux pas were unfortunately occasionally encouraged by sections of the press which bewailed the failure to achieve radical change after the legislation had been in operation for a full six months. Some press comments showed an almost total ignorance of industrial life and an irresistable desire to wring the maximum sensation from stimulation of the sex war. Just over 6 percent of the Equal Pay cases were settled by formal conciliation - a long established and valued method of handling industrial conflict in Great Britain. Of the cases which reached Tribunals, over 40 percent were won by the complainant - a rate which compares well from the complainant point of view with cases on unfair dismissal also handled by Tribunals. Of the 184 women's cases taken under The Sex Discrimination Act, 26 were officially abandoned and 18 were settled privately. But of the 91 cases which finally reached a Tribunal, only 18 or just under 20 percent of these cases were settled in favour of the applicant, a result which bears out the contention that The Sex Discrimination Act is

too little understood.

In considering these cases it is important to take into account the decisions handed down by the Employment Appeal Tribunal. In the early months of 1976, some Industrial Tribunal decisions appeared to be confused and were undoubtedly confusing. Industrial Tribunal decisions do not constitute case law, so the results of these decisions were not permanent except for the complainant where no appeal was taken. The Employment Appeal Tribunal, whose decisions do constitute case law, has however already gone some way both to correct Industrial Tribunal decisions and to clarify the law. In general, the Employment Appeal Tribunal has attempted to interpret the intention of Parliament in passing the Acts rather than accepting a narrow legalistic construction. In interpreting the employer's defence in an indirect discrimination case that a requirement or condition was "justifiable", the Employment Appeal Tribunal has put a meaning on "justifiable" which brings it closer to the word "necessary" - an altogether tighter interpretation. The most important case influenced by the Employment Appeal Tribunal is also one which illustrates the way in which individual cases may have a lasting importance far beyond their immediate circumstances.

Ms. Belinda Price, a woman in her thirties, applied for a job at the executive level in the Civil Service. The Civil Service Department informed her that she was not eligible to apply, as jobs in this category were subject to an upper age limit of 28. Ms. Price appealed to an Industrial Tribunal with the assistance of the National Council for Civil Liberties, arguing that this condition constituted indirect discrimination since many women, for domestic reasons, were unable to apply for work under the age of 28. She lost her case at the Industrial Tribunal but on appeal to the Employment Appeal Tribunal it was agreed that it was the realities of life that had to be taken into account. On this interpretation women were in fact not as available as men for employment under the age of 28. Ms. Price finally won her case. This will require the Civil Service to revise its policy on age limits. This particular case may well have significant beneficial results for the very important category of older women seeking to return to the labour market.

Many Civil Service jobs of the executive category are available all over the country and access to them could ease the mobility problem which so often handicaps married women. Moreover many other organisations operating upper age limits for recruitment will have to re-examine their practices.

While some progress has undoubtedly been made it would be idle to pretend that the true equality of opportunity and reward which is the purpose of the legislation is at present within measureable distance of achievement. Is this because the legislation is not being properly applied, or because it is inadequate, or is it because legislation is in itself an insufficient though necessary means of achieving change? What now can and should be done?

It is clear that the legislation is not being properly applied. Part of the reason, particularly in regard to The Sex Discrimination Act, is the existing ignorance of the Act. The Equal Pay Act, though much better known, is a difficult act to interpret and in the early days at any rate, many people were genuinely confused as to its meaning. Three lines of action require to be considered.

Information about the legislation needs to be more widely diffused, and in a manner that will make it easier to understand and to use. More could also be done by the Government departments concerned. But in a democracy, it is surely not desirable that the spread of information regarding citizens rights should be entirely in the Government's hands. The spread of information is a job for trade unions, professional organisations, employers' and voluntary organisations, political parties, and especially but not exclusively, women's organisations. A certain amount is being done by these bodies but much more is required. Such organisations should make a special point of publicizing the clarification of legislation coming from the Appeal Court, and of high-lighting the potential effectiveness of individual action as in the case of Ms. Price.

But where the law is understood, it is by no means always applied as effectively as it could be. There are important signs that trade union interest in the legislation is on the increase. In the British context, there can be little doubt that the best hope for the effective implementation of the legislation lies in its incorporation into the wide area of matters normally handled by employers and trade unions, through industrial relation procedures. There can be no question that issues taken up by trade unions are far more likely to succeed than issues handled by individuals in isolation. Although the Trade union movement at the top is solidly behind the legislation, research shows that this is by no means always reflected in action lower down the line. Informal collusion between shop stewards and supervisors, unknown to either management or the union hierarchy can and does prevent the legislation from having its full effect.

However, it may be said that an Equal Opportunities Commission has been established, and it is the Commission's job to see that the law is properly applied. The Commission has been in existence for two years, and has been criticised in some quarters for its failure to use its powers sufficiently, particularly in relation to investigations which could lead to the serving of non-discrimination notices. The Commission, in its first report, argues that the field covered by the Commission is vast and that it has spent a good deal of time defining priorities and evolving a variety of methods: working parties, research, discussion with Government departments. This, though hardly dramatic, must be time well spent. The Commission has attempted to tackle discrimination at its many different sources, using persuasion as far as possible, rather than adopting a policy of vigorous legal enforcement in particular cases. This approach certainly does not satisfy all the Commission's critics. There is no doubt that a few well-publicised cases of a frontal attack on discriminatory practices in well-known enterprises, would have the result of making many other organisations examine their policies with more energy than they are at present devoting to these issues. But in the longer run the Commission may be right not to give first priority to the use of its powers of enforcement. The penalties available in British law are not of the same order as in the United States. It could be, especially at a time when a good deal of legislation affecting industry has recently been put in the statute book, that many organisations would decide to take a chance. There are many enterprises and only one Commission. "We may never get caught. The unions are pressing on other matters but not in this. Let's risk it!"

To some this kind of approach suggests that the law as it stands should be changed and the penalties made far more menacing. That the law at some points needs clarifying, most people would agree. But some at least would argue that this is on the whole best left, at any rate for some time, to the kind of process which is already going on in the Employment Appeals Tribunal.

Stiffening the law is altogether another matter. Certainly there are informed and vocal groups in Great Britain who would like to see British law and British methods far closer to the policies and practices in the United States, with the widespread use of affirmative action programmes backed by law, and with very heavy financial penalties.

The Equal Opportunities Commission could endeavour to obtain far more Draconian powers, and to use them. It is unlikely, in the present climate of British opinion that it would be granted it. But, even if it were possible to obtain such powers, is this really the best way to achieve the desired objectives? Might it not even be counter-productive? The Commission has chosen to put its main emphasis on persuasion and the education of public opinion. It is hard, if not impossible, to combine in one body the rules of enforcer and persuader. The types of relationships required for the two roles are markedly different. The attempt to assume both roles involves a degree of role conflict that may lead in the end to the satisfactory fulfilment of neither. It may be necessary for the Commission to be given stronger powers. In that case, the persuasive educative function must pass to other hands or it will remain largely undone. This is not of course a view that is everywhere or even widely accepted, but I believe the logic of the argument is irrefutable.

The problem arises because with matters of social change in an area as fundamental as relations between the sexes, law is a necessary but not a sufficient instrument. It must be used, but it must be supplemented. And the supplementation cannot come primarily, if at all, from the law enforcement agent. What is needed is to persuade the decision-makers and action-takers in industry and in education that change is desirable, that it is not only a legal obligation and a social demand, but has advantages for them in their related but different tasks. Law used too vigorously and too often can breed defensive reactions and so stem the tide of change. The more difficult, subtler, but in the end the surer way, is to work within the system where the changes have to be brought about. In attempting to use persuasive methods the Commission is to some degree recognising this fact. But to achieve its best results change must be generated from within, not imposed from without. This means it is primarily the task of trade unions, of managers, of teachers, of professional bodies and of training organisations to work at their own level. Probably exemplary sanctions are needed to trigger off the will to change. But only change that is self activated is likely to be sustained. The real problem is to find ways of stimulating such change within the system. It is to this that we should, in the main, be directing our attention.

EQUAL PAY IN THE UNITED STATES: THE DEVELOPMENT AND IMPLEMENTATION OF THE EQUAL PAY ACT OF 1963

by

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During the 20th century, the evolution of equal pay for women as a legal right has been an important development in the labor standards of the United States.

In the 19th century, especially after the Civil War, it was spoken of on occasion by public figures, and on a few rare occasions was incorporated into agreements between industry and labor. But it took two world wars in this century -- and the shortage of male workers on the home front which they created -- to bring about, first, the wide entry of women into the labor force, and, second the political thrust which made the faint cry for equal pay of 100 years ago a legal reality today.

During the First World War, when men marched off in the army and navy, women marched into the defense industries. In response to the presence of women in the industrial workforce, the War Department and the War Labor Conference Board called for equal pay without regard to sex. The War Department applied the principle to its government contracts, and the Conference Board applied the principle in more than 50 industrial dispute cases during the war years. These activities gave equal pay an impetus which carried it into the post-war years.

Other federal agencies followed the lead of those wartime actions. In 1918, the Railroad Administration issued an order requiring equal pay. Also in 1918, the Civil Service Commission ruled that all examinations for federal employment were open to women and men alike. Under The Classification Act of 1923, salary grades for federal employees were based on component job elements and were not differentiated by sex. Previously there had been considerable variation in the opportunities for men and women in qualifying for jobs and in entrance salaries.

In 1918, the Labor Department became involved in promoting the equal pay principle when The Women in Industry Service was organized. One of that office's immediate actions was to assemble a conference of trade union women, the first such conference ever to be called by the United States government.

In 1920, The Women in Industry Service was replaced by the Women's Bureau, which has been a permanent agency in the Labor Department ever since.

During the New Deal days of the early 1930's, the equal pay principle became a concern of the Roosevelt Administration. In those depression times, women were being employed in place of men because they could be hired at lower wage rates. In response to the depression, The National Recovery Act was passed and codes were established for industry, including wage rates. Approximately three-fourths of the codes adopted did not differentiate on the basis of sex in setting minimum wage rates. In July 1934, The National Recovery Administration stipulated for those industries still not codified that "female employees performing substantially the same work as male employees shall receive the same rate of pay as male employees." 1/

Since 1938, minimum wage rates have been set under The Fair Labor Standards Act without differentiation on the basis of sex.

In 1940, about one-fourth of the workforce was female, Then came the Second World War with its demand for additional labor, and by 1945 the proportion had increased to more than one-third. That five-year change, incidentally, was greater than the increase over the preceding seventy years. In those war years, women filled production jobs in such industries as steel, machine tools, munitions, aircraft production and shipbuilding. "Rosie the Riveter" was not only a popular song of the time but also a description of an important segment of the defense industry as women proved they could do many of the jobs which previously had been described as "men's work."

During World War II considerable progress was made in the equal pay area as various federal agencies endorsed it. These included the War, Navy, and Labor Departments as well as The National War Labor Board. In the context of a national wage stabilization program, the Board issued an order in November 1942 allowing adjustments to equalize pay rates for men and women doing equal work. During the next 13 months reports were filed with the Board involving voluntary pay increases to about 60,000 women. Additional thousands of women were affected under dispute cases.

There were, of course, many problems remaining. Women often were assigned to lower-paid jobs than men, because of their low seniority. Also, lower entry rates for women continued to exist, along with practices such as classifying similar work separately for men and for women--with differing rates of pay.

Nevertheless, gains made by women workers during World War II did contribute to changing the attitude toward females in the workforce. Previously, women had been thought of as cheap labor with many trade unions fearing that their entry into an occupation would depreciate men's wages. With the progress of the equal pay principle, it was recognized that such depreciation need not take place. Women's participation in labor unions began to grow, and unions gave important support to the movement for equal pay legislation.

Following the war, there was an expected drop in women's participation in the labor force, but some of the increase was retained. More important, the historical trend of increasing participation continued. Two decades later women's participation in the work force had returned to the level reached during the war, about 35 percent. Today women constitute more than 40 percent of the nation's labor force.

Passage of The Equal Pay Act in 1963 was a result of legislation ferment after the Second World War, on both the state and federal level. The state activity had begun, actually, after the First World War when Montana and Michigan passed equal pay laws in 1919. During World War II, four additonal states passed such laws--Washington, New York, Illinois, and Massachusetts. By the early 1960's, 20 states had adopted equal pay laws. Today, equal pay protection is provided by 45 states and the District of Columbia and Puerto Rico.

At the federal level, equal pay legislation was considered in the Congress immediately following World War II. Coverage was tied to the federal Government's power to regulate interstate commerce, the same power used as the basis for most legislation.

Although the bills were aimed at establishing equality for women, they generally were written to protect men as well as women from wage discrimination. Extensive hearings were held in the late 1940's by both the House and Senate, and bills were reported to both those bodies, but legislation was not passed at that time.

The move for equal pay legislation might have died there except for several factors. One was the increasing number of women entering the workforce. Another was the realization that women were serious about their role as wage earners. Eleanor Roosevelt summed that up well when she said in 1962 congressional testimony: "I hear the comment made that most women work for pin money, and that they do not need a job. Are the women who are the heads of over 4.5 million families in the United States, about one-tenth of all families, working for pin money?"2/

Another factor was the growing body of statistics demonstrating wage discrimination on the basis of sex. Let me give you some examples. In 1958-1959, the Department of Labor conducted a study of wages and related benefits in 20 labor markets. Data for establishments which employed men and women in the same job categories indicated that men's earnings averaged 11 percent more than women's in manufacturing jobs and 12 percent more in nonmanufacturing jobs; and there was little difference between states which had equal pay laws and those that did not. In one occupation--janitors, porters, and cleaners--men's average earnings were higher than women's in nearly 900 establishments, compared to about 60 in which women's earnings averaged more than men's. 3/

Data from the 1960 census indicated that, in major occupational groups, women's earnings for year-round, full-time work averaged between 60 and 70 percent of men's earnings. This was true for professional and managerial as well as nonsupervisory occupations. 4/

In 1963, a survey of job orders submitted to public employment offices in several cities showed that hiring rates for specific jobs in a variety of occupations were higher for men than for women. For example, the hiring rates for a cashier job in the dairy industry were $55 a week for a woman and $60 to $65 for a man; for a job in metal manufacturing, $210 to $260 a month for a woman and $250 to $275 for a man; for a dining-room attendant in a hospital, $2,470 a year for a woman and $2,626 for a man. It was also a widespread practice for employers to specify that they desired "men only" or "women only" in their job orders. 5/

By the beginning of the 1960's, federal interest in women's rights was sufficient to persuade President Kennedy, in 1961, to appoint The President's Commission On The Status Of Women, with Mrs. Roosevelt as its chairperson. Its mandate was to determine what remained to be done to demolish barriers to full participation of women in American Society. With members representing the Congress, the professions, business, and labor, the Commission at its first meeting in February 1962 unanimously endorsed the principle of equal pay.

In Congress the pace quickened, and both the House and Senate took up serious consideration of equal pay legislation in 1962. In addition to the basic consideration of equal pay as a matter of justice, there were several other points made by its advocates. In order to sustain consumer purchasing power and maintain decent living standards, employers should be prevented from undercutting general wage levels by paying women less than men for equal work. Women worked to provide needed income for themselves and for their families, and their earnings accounted for about 40 percent of family incomes in the United States. The majority of women in the labor force were not unionized

and lacked pay protection through collective bargaining agreements. Also, equal pay was needed if women were to be attracted into the workforce to contribute to general economic expansion.

The arguments against federal legislation were the traditional ones used against the Government's entry into the employer-employee relationship. One was the thesis, simply put, that the government did not belong in that relationship. Another was that the states could handle the job. It was also argued that women were more costly to employ because of higher absenteeism and turnover rates, and they would therefore lose their jobs to men if equal pay were required.

The answers to these arguments were not hard to come by. Should the Federal Government involve itself in the employer-employee relationship? It had since 1938, with The Fair Labor Standards Act and in many other ways; and the result was not only the protection of the employee, but also the protection of fair employers against unscrupulous competitors. Could the states do the job? Equal pay protection under state laws was spotty, and, in states having equal pay laws, coverage and enforcement varied greatly. In several instances, federal legislation was endorsed by state officials. Were female absenteeism and turnover higher? Studies showed job skill level and a worker's age to be more significant than sex as indicators of high absenteeism and turnover rates. And, clearly, women's participation in the workforce has continued to increase along with equal pay protection.

During 1962, The House of Representatives and The Senate passed differing versions of equal pay legislation but did not agree on a final bill. In 1963, equal pay protection was linked to The Fair Labor Standards Act as an amendment to that Act's section 6, which sets minimum wage requirements. This linkage was a breakthrough that made equal pay legislation acceptable to most parties. It was felt that much litigation to determine definitions utilized in determining coverage would be avoided by using FLSA definitions which had already gone through that process. Similarly, using wage and hour enforcement personnel from the Labor Department who were already experienced in investigating pay practices, appeared to assure greater employer acceptance and better enforcement as well as eliminating the cost of setting up a new administrative agency. The FLSA's minimum wage exemptions, with which employers were familiar, would apply to The Equal Pay Act. Also, the Secretary of Labor would have interpretive authority and the use of informal persuasion as well as court enforcement to achieve compliance under the FLSA.

During the legislative process, congressional attention also focused on the question of what criteria to use in determining when equal pay would be required. In 1962, the Kennedy Administration version of the legislation had used a comparable work standard and an amendment was offered to narrow the scope of the equal pay requirement to apply to equal work. In adopting the equal work standard in 1963 the Congress rejected the broad "comparable work" test, but it also did not require that jobs be identical to warrant application of the equal pay requirement. During the legislative process, clarification of what was to be considered "equal work" focused first on equal skill, and then on equal effort and responsibility and similar working conditions. These concepts had been widely utilized and accepted in the formulation of job classification systems.

When the legislation was enacted on June 19, 1963, as an amendement to The Fair Labor Standards Act, the principle of equal pay for equal work, regardless of sex, became a requirement of federal law--along with the minimum wage, overtime pay, and child labor standards. To allow an adjustment period, the equal pay requirements became effective one year after the law's enactment for most coverage, within two years after enactment for employees covered by collective bargaining agreements in effect at least 30 days prior to the Bill's passage.

What Does the Equal Pay Provision Do?

Briefly, it prohibits covered employers from paying employees of one sex at a rate below that paid to employees of the other sex for equal work on jobs requiring equal skill, effort, and responsibility which are performed under similar working conditions. Employers paying an illegal wage-rate differential are prohibited from reducing the wages of any employee to achieve compliance. Exceptions are permitted where differentials are due to application of a bona fide seniority system, merit system or system which measures earnings by quality or quantity of production, or any other factor other than sex. However, if the wage differentials are in any way based on sex, they are illegal and cannot be legitimized by these exceptions.

When passed in 1963, the equal pay provision affected 30 million non-supervisory workers in a variety of industries. These included manufacturing, transportation, public utilities, communications, insurance, finance and real estate, wholesale trade, and, to some extend retailing and services. Subsequently, amendments have extended equal pay coverage to substantial numbers of workers.

As a result of FLSA amendments in 1966 and 1974, equal pay coverage was extended to a number of areas in which the employment of women is concentrated. In 1966, about nine million workers were affected in schools, hospitals, nursing homes, laundries, drycleaning establishments, retail trade, and on large farms. In 1974, coverage was extended to public employees at the state and local levels, as well as the federal. Also, in 1972, a provision in education legislation extended equal pay coverage to approximately 14 million additional employees--primarily professional, administrative, and executive employees--who are exempted from the minimum wage and overtime provisions of The Fair Labor Standards Act. This action is especially important for assuring that promotional opportunities for women are accompanied by equal pay.

As a result of these extensions in equal pay coverage and growth in our economy, there are now more than 75 million workers covered by federal equal pay protection in the United States.

How is the Law Enforced?

Either upon receipt of a specific complaint from an individual or as a part of a general wage-hour investigation, The Labor Department's Wage-Hour Compliance Officers have broad investigative authority to examine employers' records, and to interview employees. If an equal pay violation is discovered, the employer is requested to eliminate the discriminatory practice by raising the lower wage of the aggrieved sex to the higher wage of the opposite sex and also to pay back wages computed to be due.

In the majority of cases, the employer complies voluntarily when The Equal Pay Act violation is brought to his attention. When he does not, the matter is transmitted to the appropriate regional solicitor of the Labor Department if the case is suitable for litigation. The solicitor then may seek remedial action through the courts. He or she can sue--on behalf of the Secretary of Labor-- to obtain compliance and recover the back wages due the employees. The solicitor may also seek liquidated damages in the amount of back wages due.

The individual employee, who feels himself or herself aggrieved,also has the right to sue the employer for back pay and an additional sum, up to the amount of back pay, as liquidated damages, plus attorney's fees and court costs. This right, however, is terminated if the department institutes a suit involving the employee.

A two-year statute of limitations applies to violations which were not willful and a three-year statute applies to willful violations. A "willful" violation in this context does not mean "intentional" violation but has judically been held to have occurred "when there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA." 6/

The Equal Pay Act also forbids labor organizations from causing, or attempting to cause, an employer to discriminate against employees in violation of the Act. However, the Act does not provide explicit monetary sanctions for violation of its terms by a labor organization.

Since 1963 there have been thousands of complaints alleging violations of The Equal Pay Act, and investigations have disclosed more than $150 million in wage underpayments in violation of the equal pay provisions of the FLSA, involving approximately 260,000 employees. During the 1977 fiscal year, the Department of Labor contended that almost $16 million was owed to more than 19,000 employees because of equal pay violations, and $7 million was actually restored to about 13,000 workers. The fact that the total recovered by the Department is less than the amount contended due to employees is largely due to disagreements between the Department of Labor and employers as to whether violations have occured and as to the amounts due because of such violations. In addition, the courts have not always accepted the Department's view of what constitutes "equal" work and how much money is due. Nevertheless, the Department by and large has been successful in persuading the courts in adopting its view of the law in the approximately one thousand equal pay cases filed since the Act went into effect in 1964. This litigation has been extremely important in building a body of law which--once established--facilitates voluntary compliance. Extensions of coverage and the fact that lawyers continuously devise novel defenses, continue to make litigation an important aspect of implementing the equal pay principle right up to the present time.

Let us consider some of the legal principles established by this litigation.

The Wheaton Glass Company case, which the U.S. Court of Appeals in Philadelphia decided in 1970, and which the United States Supreme Court declined to review, 7/ was the first equal pay case to reach an appelate court.

This case established several very important legal principles which have been followed by other courts in the many decisions that have been handed down since that time.

1. The "equal work" standard requires only that the compared jobs be "Substantically equal", not identical. Small differences in job content will not make jobs unequal.

2. Once the Secretary of Labor (or a private plaintiff in a private suit) has shown that a wage differential exists between men and women doing substantially equal work, the burden falls on the employer to prove, if he can, that the differential is explained by some other factor other than sex.

3. Where some, but not all, of the members of one sex perform significant extra duties in their jobs, these extra duties do not justify giving all members of that sex a higher wage. Only those employees performing the extra duties are entitled to the higher wage.

4. The fact that most men may be able to perform some heavy lifting or other duties that women are deemed unable to perform, is in itself not of such economic value that it would be a "factor other than sex" which would justify a higher male wage rate. In order to justify a higher male rate, the employer must prove the alleged advantage in specific dollar and cents terms, and the extra duties must have been offered to women on the same terms as the men.

5. An employer's classifications and job descriptions are totally irrelevant to showing that work is unequal unless they accurately reflect actual job content.

The facts which lead to these conclusions are interesting, as they show a recurrent pattern of sex discrimination in an industrial setting. The Wheaton Glass Company manufactured glass at a plant in which women had only become employed in the selecting-packing process in 1956, when there was a shortage of men in the local workforce. The union and the employer together negotiated a ten percent wage differential; moreover, women could be hired only to replace men who had left their jobs. The 10 percent differential was still in effect in 1966 when the Secretary of Labor sued the company. At the time of the trial, work performed by both sexes was virtually identical. The men spent 92.6 percent of their time on basic selecting-packing work, (although the employer contended it was 82 percent). The women spent 98 percent of their time doing the same work. The remainder of the time of both sexes, was spent in incidentals to the job, such as moving pallets, fetching cartons, etc. The fact that the men's portion of these tasks was greater than the women's was due to the fact that when the cooling ovens shut down for a production change, which occurred fairly frequently, the men were assigned to perform these incidental duties. The women, however, were simply moved to another selecting-packing area to continue with their regular work.

Most of the work incidental to the selecting-packing process, was performed by employees known as "snap-up boys" who made 19 cents less per hour than the men selector-packers, but 2 cents more than the women selector-packers. The low value, which the company put on the work of the"snap-up boys" convinced the court that the employer had no basis for asserting that the men selector-packers were paid 10 percent more than the women because some of them occasionally performed tasks generally performed by the lower paid "snap-up boys". Eventually the Department of Labor collected $900,000 in back wages and interest to be distributed to over 2,000 female selector-packers.

The Corning Glass case, 8/ the only equal pay case to have reached the United States Supreme Court, was another case in which an employer unsuccessfully attempted to maintain pre-Equal Pay Act sex-based wage discrimination by seeking to justify the existing discrimination in terms of The Equal Pay Act. The discrimination had its inception in the 1920's when Corning instituted 24-hour operations and was prevented, by state laws, from employing women on the night shift. Therefore, although all its day shift inspectors were women, it had to staff the night shift with male inspectors. Because men were reluctant to perform what they considered demeaning women's work, Corning paid the men night inspectors considerably more than it did the women day inspectors, in order to encourage them to work on the night shift. Even when unionization --and with it the shift differential--arrived in 1944, the men's base pay remained higher than the women's. In 1966, several years after the state laws prohibiting night work by women had been repealed, and after The Equal Pay Act had been in effect, Corning finally remitted women to bid for inspector vacancies on the night shift. However, the base pay of women inspectors on the day shift remained substantially below that of the night shift employees. In 1969, Corning equalized the base rate for all day and night inspectors to be hired thereafter, but insisted that all those hired before 1969 were to continue at a higher base rate. Corning's defense to suits by the Secretary of Labor charging Equal Pay Act violations were twofold. First, it asserted that the work of the men and women inspectors was performed under different working conditions, because the men worked at night and the women during the day. Second, Corning argued that the admission of women to the night inspector jobs, and the equalization of base pay for employees hired after 1969, cures The Equal Pay Act violation. The Supreme Court rejected both claims. It held that "working conditions," as used in The Equal Pay Act, and as understood in industrial parlance, did not refer to the time of day during which work was performed. The Court also ruled that equal pay violations could only be cured by raising the pay of all the women to that of the men. The latter holding is particularly important for Equal Pay Act enforcement, since employers frequently seek to avoid charges of Equal Pay Act violations merely by admitting women, often only in token numbers, to higher-paid jobs that once were held exclusively by men.

Since the law defines work equality in terms of equality of "skill," "effort," and"responsibility," the question of what constitutes equal skill, effort, and responsibility has been central tc the question of what constitutes equal work. Let me give you a few examples of how the courts have defined these terms. These cases also give some insight into occupations and areas of the economy in which equal pay issues have arisen.

Two important considerations, on which the courts have focused attention in defining equal effort, have been heavy lifting and mental exertion. The claim that men exert more physical effort than women because they do heavy lifting has been a popular excuse for sex-based wage discrimination. Although modern factories, with automation and laborsaving devices, often do not require many heavy work duties, men--including those who seldom, if ever , do heavy lifting--sometimes continue to be paid higher wages on the ground that their work requires greater effort than women's.

This issue was highlighted in an early case involving The American Can Company. 9/ In that case, the male machine operators' duties were virtually identical to the female operators' duties for 93 to 98 percent of the males' work time. The men, but not the women, moved heavy rolls of paper a few feet and then loaded them onto machines either manually or mechanically. Because of the infrequency of that exertion, the United States Court of Appeals in Saint Louis ordered that the men's handling and loading functions did not involve substantially additional effort. The Court buttressed its opinion by pointing out that, although the male operators exerted varying degrees of physical effort, no wage differential existed among them.

In the case of Daisy Manufacturing Company, 10/ makers of air rifles and related products, the Court insisted that mental as well as physical effort must be taken into account in establishing equality of effort. There, some jobs held by males involved considerable physical effort, but the jobs held by women, while requiring less physical effort, required great mental effort because of the stress from fear of injury while operating the high-speed machines assigned exclusively to women. The Court concluded that the mental fatigue and stress of the women required a level of effort equal to the physical exertion of the men.

Another area in which employers have claimed that greater physical effort on the part of men justifies a wage differential, is the area of janitorial services, where the men frequently are assigned to operate cleaning machinery such as waxers, buffers, and scrubbers, while the women are relegated to the stooping and reaching necessary in the performace of machineless cleaning tasks. The Department has taken the position--sometimes, but not always, accepted by the courts--11/ that given the ease with which modern cleaning machinery is operated, the tasks of men and women cleaners require equal effort regardless of which sex operates the machines. The mere fact that women are not given the opportunity to operate the machines, has been viewed by some courts as raising suspicions about the bona fides of the employers' claim of work equality, especially in situations where male job applicants' ability to perform heavy physical labor was not inquired into before they were hired as cleaners.

In the area of what constitutes equal skill, one of the first equal pay decisions by the courts established the rule that the possession of skills not needed, and not exercised by the employee in the job he holds, does not justify a pay differential in equal jobs. 12/ An interesting question arose in several cases involving female nurses' aides and male orderlies in hospitals whose work the department contended was equal. 13/ In these cases, the performance of catheterization of male patients, a relatively simple procedure, was for reasons of patient modesty, assigned to male orderlies only. For reasons of anatomy, catheterization of female patients can only be performed by a trained nurse or doctor--not by a nurses' aide, thus, the hospitals uniformally insisted that the aide-orderly wage differentials were justified by the orderlies' possession of an additional skill.

Fortunately, we have been able to persuade most courts that the skills usually practiced exclusively by aides, such as caring for premature babies, are substantially equal in skill to the orderlies' catheterization skills.

Responsibility is a consideration that is especially important to employees in administrative, professional, and executive jobs. However, because such employees were generally excluded from coverage under The Equal Pay Act until 1972, judicial decisions in this area have not been as extensive as in other types of employment.

One early case dealt with a warehousing operation. 14/ The United States Court of Appeals in Richmond, Virginia, held that the employer's claim that the man exercised greater responsibility was not warranted. The employer's claim to greater responsibility had been based on the fact that he made decisions which the women employees did not make. The Court found that the man's decisions were subject to review and change by his supervisor and that therefore these decisions did not entail more responsibility than the duties he performed in common with female employees.

In the case involving The American Bank of Commerce, 15/ the United States Court of Appeals in New Orleans rejected the bank's contention that a disparity between a male teller and female tellers was justified because the man set the break period for the other tellers and assisted them in balancing out and handling unusual problems. Finding the jobs equal, the Court said that the small and infrequent assistance provided by the male did not justify the differential. The Court also noted that the male had no authority to hire or fire, to control work schedules, or to discipline other tellers.

In the retail sales industry, department store chains, including Sears and others, 16/ have often claimed that the management of softline departments such as clothing, which are usually managed by women, entails less responsibility than the management of hard-line departments such as sporting goods, which are usually managed by men, and that therefore wage differentials between the two jobs are justified. We have been successful in persuading the Courts that there is no substantial difference in the responsibility required to manage these two types of departments.

Extensions of the equal pay requirement to professional employees has made that requirement applicable to the teaching profession. Court decisions have supported comparisons of male and female high school coaches coaching different sports. For example, in a case involving a Delaware high school, 17/ the Court compared the work done by a female softball coach with that of a male hardball coach. The Court found that they were doing equal work but that the woman was receiving less pay. It ordered back pay and a wage increase for her.

Some of our most important litigation, now in progress, involves the application of The Equal Pay Act to teachers in colleges and universities. In these cases, the range of job duties tends to be broader and the level of skill much greater than in early equal pay cases, which often involved semi-skilled or even unskilled workers. Although the Department of Labor has filed many lawsuits in this area, no decisions have yet been issued by the courts.

A critical concept in the application of the equal pay law, which has been accepted by every court before which the question has been raised, is that concurrent employment of the two sexes need not be established to make a comparison under the equal pay principal. In a case involving the Behrens Drug Company, 18/ the United States Court of Appeals in New Orleans found violations of the law by comparing the wage of a female employee with that of the male whom she replaced. The male had resigned 4-1/2 years before suit was brought and had been immediately replaced by the lower-paid woman. When the Department instituted suit, the woman was still earning less than what the male had been paid. The Court held that concurrent employment of men and women is unnecessary to establish Equal Pay Act violation. There the woman was found entitled to the same pay rate as the man she replace.

Because the exceptions to the equal pay requirement are broadly drawn, particularly the one that permits inequality based on any factor other than sex, care must be taken that "the exception does not swallow the rule," to use the words of Judge Brown of the United States Court of Appeals in New Orleans in The First Victoria National Bank case. 19/ There, the bank had sought to justify the pay differential between it's men and women tellers by claiming that all the men, but none of the women, were management trainees. The Court rejected this alleged training program as a factor other than sex, pointing out that the "trainees" had never been informed that they were on a training program, that such a program had no indentifiable content, and that it had been limited to men only.

As I have pointed out before, the Act forbids labor organizations from causing, or attempting to cause, employers to discriminate against employees in violation of the Act. By and large, unions have co-operated well with the Department of Labor in uncovering and resolving sex-based wage differentials In fact, such differentials are frequently brought to our attention by unions, after they have been unable, during contract negotiations, to persuade the employer to equalize the contractual wage rate.

In those cases, where the unions have abetted the employer in retaining sex-based wage differentials, we have tried to obtain court injunctions against both the employer and the union. Because the law does not provide for the collection of back wages from unions, and also because it would give the employer an unfair competitive advantage for the unions to be made responsible for all the employer's wage underpayments, we have generally not sought back wages from unions. However, in one instance, the Sagner case, 20/ where the union insisted over the employer's protest on the perpetuation of a sex-based wage differential, we successfully invoked the general equity powers of the court, which held the employer and the union jointly and severally liable for the back wages due the women employees because of Equal Pay Act violations.

Under The Equal Pay Act, in determining job equality, we have been successful in establishing that actual job content,rather than job classification or description, forms the basis for job comparison. While the legislative history of the Statute prevents us from comparing totally different jobs, such as secretaries with janitors, similar jobs can be compared and assessed regardless of title or classification. Thus comparisons may be made between female nurses' aides and male orderlies in a hospital, male accountants and female bookkeepers in a firm, or a woman who is an executive secretary and a man who is an administrative assistant, and so on.

Although increasing numbers of women are securing higher-level and better-paying jobs, the predominance of women in lower status occupations continues to be a troublesome feature of our nation's labor force. Labor Department statistics on the median earnings of year-round, full-time workers, indicate that the wage gap between men's median earnings and women's has grown rather than diminished. Whereas in 1955 the median level of earnings for women was 64 percent of the median for men, the women's median had dropped to 59 percent of the men's in 1975--$7,504 compared to $12,758 a year. 21/

The most important reason for this is the continuing predominance of women in low status occupations. In addition, with the increasing participation of women in the workforce, a large proportion of women are recent entrants or re-entrants into the labor force who must take jobs at or near the entry level. These relatively low-paying jobs tend to pull down the median earnings. Also, there are differences in hours worked, as men more frequently do overtime work. Obviously, equal opportunities are also needed to achieve economic equity for women in the workforce.

Equal opportunities to pursue higher-paid work are necessary, along with equal pay for equal work, if the wage gap between men and women is to be closed. The providing of such equal opportunities is mandated by Title VII of The Civil Rights Act of 1964, which is adminstered by the Equal Employment Opportunity Commission, an independent agency.

The Civil Rights Act of 1964 includes a broad prohibition against discrimination in employment on the basis of sex (as well as race, color, religion, and national origin)--in hiring, promotions, and other privileges and benefits of employment, as well as in pay. In section 703 (h) of this Act, Congress made clear that any wage differentiation authorized by The Equal Pay Act would not be unlawful under Title VII. Thus the Congress mandated consistent application of equal pay principles under these two laws where concurrent coverage exists.

Federal Executive Order 11246, issued in 1965, prohibits discrimination on the basis of race, religion, color, or national origin and required affirmative action to assure nondiscrimination in employment on federal contracts. In 1967, this requirement was amended to apply to discrimination on the basis of sex as well. Administrative responsibility for the application of Executive Order 11246 as well as The Equal Pay Act is in the Employment Standards Administration of the Labor Department, and there is coordination to assure conformity in interpretations and regulations involving equal-pay issues.

An important example of coordination in the application of these three legal tools for combatting sex discrimination, involved the American Telephone and Telegraph Company (AT&T). Equal pay violations were disclosed by wage-hour investigations, and the problem was resolved by the solicitor of the Labor Department in cooperation with the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance. Consent Decrees in 1973 and 1974 resulted in payment of approximately $24 million in back wages to managerial and nonsupervisory employees of AT&T.

In summary, the development and implementation of the federal equal pay law in the United States has been a prominent and important achievement on the path towards assuring fair treatment for women, and in maintaining pay levels for men in the nation's workplaces. While complete economic equity has not been achieved for women, a great deal of progress has indeed been made towards eradicating discriminatory pay practices, and we at the United States Department of Labor are fully committed to continuing progress towards this goal.

I appreciate having this opportunity to discuss with you the progress we have made in the area of equal pay for equal work.

FOOTNOTES

1. United States Senate, Hearings before a Subcommittee of the Committee on Education and Labor, October 29, 30, and 31, 1945, Statement of Miss Frieda S. Miller, Director, Women's Bureau, United States Department of Labor, Exhibit A, p. 31.

2. United States House of Representatives, Hearings before the Select Subcommittee on Labor of the Committee on Education and Labor, Part 2, April 27 and 28, 1962, Statement of Mrs. Eleanor Roosevelt, Chairman, President's Commission on the Status of Women, p. 225.

3. United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 1240-22, "Wages and Related Benefits, 20 Labor Markets, 1958-59," pages 39-45; cited in: United States Senate Hearing before the Subcommittee of Labor of the Committee on Labor and Public Welfare, August 1, 1962; Prepared Statement of William E. Schnitzler, Secretary-Treasurer, AFL-CIO, p. 67; and United States House of Representatives, Hearings before the Select Subcommittee on Labor of the Committee on Education and Labor, Part 1, March 26, 27, and 28, 1962, Statement of Hon. Esther Peterson, Assistant Secretary of Labor, Exhibit D; p. 41.

4. United States Department of Labor, Women's Bureau, Pamphlet 9, "Economic Indicators Relating to Equal Pay, 1962," P. 8.

5. United States House of Representatives, Hearings before the Special Subcommittee on Labor of the Committee on Education and Labor, March 15, 25, and 27, 1963, Statements of Hon. W. Willard Wirtz, Secretary, and Hon. Esther Peterson, Assistant Secretary, United States Department of Labor, pp. 13-14.

6. Coleman v. Jiffy June Farms, Inc., 458 F. 2d 1139 (C.A. 5, 1971), cert. denied 409 United States 948 (1972).

7. Shultz v. Wheaton Glass Co., 421 F. 2d 259 (C.A. 3, 1970, cert. denied, 398 United States 905 (1970).

8. Corning Glass Works v. Brennan, 417 United States 188 (1974).

9. Shultz v. American Can Company--Dixie Products, 424 F. 2d 356 (C.A. 8, 1970).

10. Hodgson v. Daisy Manufacturing Co., 445 F. 2d 823 (C.A. 8, 1971), affirming in part and remanding 317 F. Supp. 538 (W.D. Ark. 1970).

11. Compare Dunlop v. Houston Endowment, Inc., 511 F. 2d 1190 (C.A. 5, 1975) cert. denied 423 United States 893, with Usery v. Columbia University, 23 WH Cases 513, 78 CCH Labor Cases para. 33,593 (C.A. 2, 1977).

12. Wirtz, v. Basic, Inc., 256 F. Supp. 786 (D. Nev. 1966).

13. See, e.g., Brennan v. Prince William Hospital Corp., 503 F. 2d 282 (C.A. 4, 1974); Hodgson v. Brookhaven General Hospital, 436 F. 2d 719 (C.A. 5, 1970).

14. Hodgson v. Fairmount Supply Co., 454 F. 2d 490 (C.A. 4, 1972).

15. Hodgson v. American Bank of Commerce, 447 F 2d 419 (C.A. 5, 1971).

16. See, e.g. Brennan v. J.M. Fields, Inc. 488 F. 2d 443 (C.A. 5, 1973), rehearing denied 488 F. 2d 450 (1974); Brennan v. Sears, Roebuck & Co. 410 F. Supp. 84 (N.D. Iowa 1976).

17. Brennan v. Woodbridge School District, 21 WH Cases 966, 74 CCH Labor Cases para. 33, 121 (D. Del. 1974).

18. Hodgson v. Behrens Drug Company, 475 F. 2d 1041 (C.A. 5, 1973), cert. denied 414 United States 826 (1973).

19. Shultz v.First Victoria National Bank, 420 F. 2d 648 (C.A. 5, 1969).

20. Hodgson v. Sagner, Inc., 326 S. Supp. 374 (D. Mch. 1971), Aff'd Sub nom Hodgson v. Baltimore Regional Joint Bd . Amal. Clothing Workers, 642 S. 2d 180 (C.A. 4, 1972) (per ciriam).

21. U.S. Department of Labor, Bureau of Labor Statistics. "U.S. Working Women: A Databook," 1977, p.35.

EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED ITS HISTORY AND OPERATION

by

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Introduction

Equality is a concept deeply rooted in American constitutional law. The road to full achievement of equality for minorities and women has been a thorny one filled with pot holes, detours, and dead-ends, so to speak. Achievement of racial equality in the United States for Blacks has been a problem facing the country since its inception, and one which has affected all aspects of American life.

Nowhere is discrimination more devastating than in the area of employment. It has resulted in high levels of unemployment for minorities, especially Blacks, in wide gaps between Black and White economic achievement and in relegating minorities and women to the lower end of the employment ladder.

In 1947 President Harry Truman's Committee on Civil Rights found that discrimination was most acutely felt by minority groups in their inability to get a job suited to their qualifications, and urged that the national government assume leadership in the American civil rights program because it felt that there was much in civil rights that the federal government is squarely responsible for in its own direct dealings with millions of Americans. John Hope Franklin has written:

> "Few developments have affected the movement for racial equality more than the assumption of some responsibility by government itself."1/

Within a decade after the Truman Committee, Congress created the United States Commission of Civil Rights signaling direct congressional attention to matters directly affecting race. However, no major civil rights legislation was acted upon by Congress until 1964.

There were a number of events which led to the 1964 legislation. In May of 1963, racial trouble erupted in Birmingham, Alabama. The people of the United States saw on their televisions, night after night, incidents of the use of force against demonstrators, including children, protesting discrimination. Bombing and riots resulted, making it necessary to use federal troops to stabilize the situation. The incidents in Birmingham, as well as other racial incidents, brought home to the American people and to the then adminstration of President John F. Kennedy that something was terribly wrong, that an intolerable situation existed which had to be corrected. Suddenly, "the time had come for consideration by Congress of major civil rights legislation." 2/

On June 19, 1963, President, John F. Kennedy stated:

> "I enlist every employer, every labor union, and every agency of the government....in the task of seeing to it that no false lines are drawn in assuring equality of the right and opportunity to make a decent living." 3/

In August of 1963, the historic March on Washington took place dramatizing the need for comprehensive action by the federal government in the Civil Rights area.

On July 2, 1964, the United States Congress passed The Civil Rights Act of 1964. 4/ described by some as the most comprehensive, far-reaching civil rights bill ever passed by Congress. The Act became effective on July 2, 1965. The Civil Rights Act of 1964 prohibited discrimination in public accommodation, housing, voting rights, etc.

Many feel that Title VII of the Act has been its most important part.

Title VII of the Civil Rights Act of 1964

Title VII of The Civil Rights Act of 1964, 4/ prohibits discrimination in employment by employers, labor unions, employment agencies, and joint apprenticeship committees on the basis of race, colour, sex, national origin, or religion. It created a federal agency, the Equal Employment Opportunity Commission, which was given the sole responsibility for the elimination of employment discrimination

The Equal Employment Opportunity Commission (sometimes hereinafter referred to as the EEOC or the Commission) was enpowered to receive and investigate charges of employment discrimination filed by persons aggrieved; to defer these charges to state and local agencies when appropriate for action; to make a determination as to whether there is reasonable cause to believe discrimination has occurred; and if reasonable cause is found, to attempt by informal efforts to conciliate the matter.

Prior to the amendments to Title VII made by The Equal Employment Opportunity Act of 1972 5/, if conciliation efforts failed, the EEOC had no enforcement powers. Thus the whole premise of Title VII was based on voluntary compliance, and informal efforts of persuasion and conciliation. Congress had created a tiger without teeth. Title VII did, however, create a right of private action by the aggrieved individual. The party aggrieved, the charging party, had the right to a right to sue letter at the termination of EEOC processing of his or her charge, or at the expiration of 180 days after filing of the charge upon request. This right to sue letter provides the charging party with access to federal district court where he or she is entitled to a trial de novo 5/ on the issues presented.

Despite the fact that the EEOC had no enforcement authority as originally created, it was able through the issuance of Regulations, Guidelines, and Commission Decisions, as well as through participating as amicus curiae (as a friend of the court) in private suits filed in court, to take the lead in defining what is discrimination, and what employment practices and systems discriminate and therefore are prohibited by Title VII.

During the period from the passage of Title VII in 1964 to 1972, the Commission issued a number of Guidelines. It issued the initial set of Guidelines on Discrimination Because of Sex in 1965, with a number of subsequent revisions. 6/ The Sex Guidelines define when sex may be a bona fide occupational qualification (BFOQ); proscribed separate lines of progress and seniority systems for male and females, prohibit discrimination against married women; prohibit sex-segregated advertising for job opportunities; prohibit unequal treatment in fringe benefits based on sex and covers employment policies relating to pregnancy and childbirth.

In 1967, the Commission issued its Guidelines on Discrimination Because of Religion 7/ which now require requiring employers to make a reasonable accommodation to the religious needs of employees where such accommodation can be made without undue hardship on the employer and placing the burden on the employer to show undue hardship.

In 1970, the Commission issued its Guidelines on Discrimination Because of National Origin, 8/ which among other things prohibit discrimination on the basis of citizenship where such discrimination has the effect of discriminating against persons of a particular national origin.

The Commission also issued its Guidelines on Employee Selection Procedures (commonly referred to as the Testing Guidelines) in 1970.9a/ These guidelines cover the use of test in making employment decisions and define "test" as any paper and pencil or performance measure used as a basis for an employment decision. Significantly these Guidelines proscribe the use of any test which adversely affect hiring, promotions, transfers, or any other employment opportunity of classes protected by Title VII unless the test has been validated, evidences a high degree of utility, and the person using the results of such test can demonstrate that alternative suitable hiring, promotion, or transfer procedures are unavailable.

Title VII gave the EEOC authority to require that certain employment records be kept, and pursuant to this authority the Commission has adopted regulations requiring employers subject to its jurisdiction (employers with 15 or more employees) to maintain certain employment information. Utilizing this authority, the EEOC has issued record keeping regulations requiring the maintenance of certain employee records and the filing of the appropriate Equal Employment Opportunity Reports (EEO reports) by certain employers, labor organizations, joint labor-management committees, state and local governments,elementary and secondary schools, and institutions of higher education. 9b/ These reports provide the EEOC with information on employment profiles of entities subject to its jurisdiction in specified job categories and assist the Commission in assessing, when possible, discriminatory employment systems exist, where protected groups are under-utilized, and provide data for use by the Commission in all its programs to eliminate employment discrimination. The EEO data is useful in the investigation of charges against an employee and in court enforcement actions.

As the result of private litigation and EEOC participation in such litigation as a friend of the court by filing briefs on the legal issues raised, important legal concepts of employment discrimination law were developed during the period from 1966 to 1972, a period in which EEOC had no authority to do more than attempt to conciliate a charge of discrimination when it found reasonable cause to believe discrimination had occurred. The first important concept or theory of discrimination is that of disparate treatment, where similarly situated employees are treated differently under circumstances where there is no adequate nonracial, nonsexual, etc. explanation for the treatment. In such cases comparative data is important to proving discrimination 10/ since direct evidence of discrimination is today virtually impossible to produce. The disparate treatment theory was the common concept of discrimination at the time of passage of Title VII. Examples are differential treatment of men and women with respect to fringe fenefits, and unequal discipline for similar offenses.

The second concept of discrimination developed by the courts is the theory of discrimination based on the perpetuation in the present of the effects of past discrimination. 11/ Beginning with early court decisions in the cases of Quarles v. Phillip Morris, Inc. 12/ and Local 189, Papermakers v. United States 13/ it was held that a seniority system and a transfer system were discriminatory and in violation of Title VII if they locked previously discriminated against minorities and women into inferior positions into which they were originally placed as a result of discrimination. Such systems even though they appeared neutral on their face perpetuated Pre-Act discrimination and therefore violated Title VII. The Courts indicated that Congress did not intend to freeze an entire generation of Blacks into the discriminatory employment patterns that existed before the passage of Title VII.

In Robinson v. Lorillard Corp., 444 F. 2d. 791 (CA4., 1971), the Court of Appeals held that it is a violation of Title VII for an employer or other entity subject to Title VII to maintain any employment policy or practice which perpetuates prior discrimination unless compelled by business necessity. The business necessity defense requires a clear and convincing showing by the employer that the employment practice in question is indispensable to the safe and efficient operation of the business.

A third theory, the theory of adverse impact, marked a new interpretative approach to discrimination law resulting in the landmark decision of the Supreme Court in Griggs v. Duke Power Company. 14/ The employer's state of mind has been declared irrelevant, and it is not necessary to show intent to discriminate. The crucial question in such cases is the effect of the employment practice. If the employment practice has a substantial adverse impact on minorities and women and is not job-related or required by business necessity, it is considered a violation of Title VII. In Griggs, the Supreme Court held that if a test had a substantial adverse impact on minorities or women it was not enough that the employer used scored tests developed by professionals; he must show that the test is job-related. 15/

The Supreme Court here endorsed the EEOC Testing Guidelines,referred to earlier, which required that employment tests be job related. Thus Title VII prohibits not only overt discrimination, but also employment practices which are fair in form, but discriminatory in operation. Good intent or absence of discriminatory intent are irrelevant. This approach has been used to alter numerous employment practices which have had the effect of excluding minorities and women from employment opportunities. Such common employment practices as nepotism and related rules allowing the hiring of family members and friends of incumbent workers in plants where the workforce is predominately white, union referral systems giving preferences to persons who previously worked under the union's jurisdiction where Blacks, females, or other minorities had once been excluded, are prohibited using the adverse impact theory. Such practices as requiring minimum educational requirements, and refusal to hire persons with arrest records have been barred by the courts as in violation of Title VII based on their adverse impact on a protected group, even though not caused by the employee's past discrimination, but by general practices of society. 16/ Subjective practices as well as objective requirements which adversely impact on the employment opportunities of minorities and women are prohibited by Title VII. 17/ Of course, if the employment practice which has an adverse impact on protected classes is justified by business necessity, it is not prohibited.

The final theory that an employer has the duty to reasonably accommodate the religious needs of employees is contained in the EEOC Guidelines on Discrimination Because of Religion. Recent court decisions and developments have had an impact on refining, altering or limiting in some respects the above theories. Significant ones will be discussed at a subsequent point in this paper.

The 1972 Amendements To Title VII

The 1965 Act gave the EEOC no enforcement tools, and while it did provide for private court action, the various administrative steps and timetables built into the Act, and the soon to be developed backlog of charges at the Commission, tended to frustrate or slow down even private enforcement action.

On March 24, 1972, the Act was amended to give the EEOC authority to file, law suits against private employers, employment agencies and unions when conciliation efforts failed. The Commission may enforce Title VII by bringing a direct suit against an employer in the public interest when conciliation has failed, or by a request to intervene in private Title VII actions filed by individuals when it deems such intervention is in the public interest. It expanded the Commission's jurisdiction to public and private educational institutions and to state and local government agencies,and broadened the coverage from employers with 25 or more employees to employers with 15 or more employees. While the Commission was given authority to administratively process charges of discrimination against state and local agencies, the Justice Department was given authority to enforce in court the Act with respect to state and local agencies.

Using its enforcement authority, the government has been able to negotiate a number of significant consent decrees with major employees for compliance with Title VII. The AT&T Decree was negotiated by the Justice Department and the Labor Department with AT&T and its 24 operating telephone companies on a nationwide basis calling for numerical goals to increase employment opportunities for Blacks and women in the Bell System, for transfer and promotion opportunities for minorities and women and for monetary relief for discrimination. A subsequent decree with AT&T resulted in the Company agreeing to revise its procedures for setting salary levels of new managers and the adoptions of safeguards against the future underpayment of women. AT&T agreed also to make restitution to its women managers whom the government claimed had been underpaid. As a result of both consent decrees, AT&T has paid out approximately $100,000,000 in financial restitution and wage adjustments. Nearly 50,000 minorities and women have received some form of payment. There have been attacks on the decrees and it has been necessary for the government to closely monitor compliance and propose subsequent action to assure full implementation and compliance with the provisions of these decrees.

Another significant nationwide settlement with a major portion of the Steel Industry involving nine steel corporations, the United Steelworkers of America, the EEOC, the Department of Justice and Labor was entered in the form of two consent decrees in April of 1974. The decrees provide for full utilization of Blacks, Spanish Surnamed Americans, famales and long time service production and maintenance workers of the industry by increasing their promotional transfer opportunities; for backpay of $31 million to certain incumbent minorities and females employees; and placing of females in certain management positions. Under the 1972 amendments, the Federal District Courts are provided a full range of remedies to utilize in employment discrimination cases. In the Supreme Court case of Albermarle Paper Co. v Moody, 18/ the court affirmed the use of backpay awards as part of Title VII relief and held that backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination and making persons whole for injuries suffered as a result of past discrimination. Title VII is an equitable statute, and the courts, under their equitable powers may order injunctive relief as well as such remedies for employment discrimination as the hiring or promotion of specific individuals, affirmative recruiting programs, payment of backpay or front pay to a class; and affirmative relief such as establishment of goals and timetables. The court may allow, under Title VII, attorney's fees to the prevailing party.

The EEOC was given authority to issue a subpoena in the course of the investigation of a charge of discrimination, and to bring an action to compel compliance with court orders.

There is no real way of knowing what impact on employment discrimination the fact of court enforcement authority in EEOC has had in the early years of the use of court enforcement, defendant employers, unions, etc. against whom an EEOC suit was filed, raised numerous procedural defenses to such suits and it has just been in the last year that some of these cases filed in late 1974 and 1975, are getting to the merits of the discrimination issues raised. There has been criticism over the last five years that the Commission was not filing enough suits in Court. To the extent that such criticism may have been valid, the small numbers of suits filed during these years were due in part to the age of the charges referred to the General Counsel and the type of investigation made of the charge. By and large a significant percentage of suits filed by the EEOC in court are settled in the form of a consent decree before trial of the matter.

Some knowledgeable Civil Rights advocates believe that Title VII's prohibition against sex discrimination may have its widest impact in this area. Although the prohibition against discrimination on the basis of sex was originally put into the Act on the floor of Congress in an attempt to defeat The Civil Rights Act in 1964, the prohibition has resulted in significant case laws and regulations that make it possible for women to enjoy more of the benefits of the workplace.

Title VII has been interpreted to prohibit discrimination on the basis of sex-related characteristics and stereotypes. Such policies as denying employment to women with young children, denying employment based on marital status and imposing mandatory maternity leave are being struck down as being in violation of Title VII. Restrictive policies regarding height and weight requirements have been held to be in violation of Title VII, where they deny women a reasonable opportunity to demonstrate their ability to perform the required job. State protective laws which prohibit women from engaging in certain activities and those which require certain differential benefits to women have been held either in conflict with Title VII, and under our Supremacy Clause must fall, or that in the case of differential benefits to women, the statute must fall or the benefits must be extended to men.

In this area an employer may hire or promote on the basis of sex where sex is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." The EEOC has in Regulations stated that this BFOQ exception should be narrowly interpreted, and that sex will be considered a BFOQ only where necessary for authenticity or genuineness.

In a very recent Supreme Court Decision in Dothard v Rawlinson 19/ where the height and weight requirements for prison guards were held illegal because of their adverse effect on women, the exclusion of women from "contact" positions in a maximum security prison characterized as a "jungle" was held to be a bona fide occupational qualification.

In the resolution of sex discrimination charges filed with the Commission, the EEOC has been able to obtain extensive affirmative relief for the charging party and class members who have been determined to have been discriminated against. Conciliation arguments and other settlements and consent decrees, almost always provide for numerical remedies in the form of goals and timetables to be met by the employer in correcting the results of discrimination policies and practices. Such relief covers both blue collar workers as well as white collar workers. In consent decrees with Merril Lynch, the EEOC obtained goals and timetables for the hiring of women and other minorities in the account brokers positions and others where they had been excluded. In the Bank of America Consent decree, goals and timetables were set up for women in mid-management positions with extensive training commitments for women and funds set aside by the bank for such training.

Despite the progress that we have made in the area of sex discrimination, there is much yet to be done. Women make up approximately 40 percent of the workforce, but they still experience higher unemployment than their male counterparts. They earn less and hold proportionately fewer of the better paying and prestigious professional and managerial positions, despite a generally equivalent average of educational background and a higher educational background in professional and managerial positions.

In the United States, according to the Labor Department's Women's Bureau handbook, the annual medium income in 1973 for families headed by males was $12,900, while that for families headed by females was only $5,600. In 1973, women earned a medium income which was only 57 percent of that earned by men.

There are areas where women experience a great deal of discrimination in which the EEOC has yet to play a major role; areas such as discrimination in higher educational institutions and in some state and local governments.

Post 1972 Developments

During the years since the 1972 amendements to Title VII, a number of developments have impacted on the achievement of equal employment opportunity, the growth of the Commission backlog of charges, the frequent changes in leadership at the EEOC and attendant management problems, the state of the economy and job market, claims of reverse discrimination, and the direction of the courts.

The Commission's workload has had tremendous growth. In 1966, the EEOC received 8700 charges of discrimination and operated on a budget of $3 1/2 million. Its inventory of charges at the end of FY 1966 was 2,300. In FY 1972 the Commission received some 32,000 charges, operated on a budget of $23 million and had a charge inventory at the end of the fiscal year of 51,000 charges. In FY 1975 the Commission received 71,000 charges, operated on a budget of $55 million and had a charge inventory at the end of the fiscal year of some 108,000 charges with the average age of the charges in inventory some two or more years old. 30 to 40 percent of these charges allege sex discrimination. 20/ The Commission's ability to provide speedy relief to discriminatees has been hampered by its inability to timely investigate charges of discrimination. Title VII comtemplates that the investigation of a charge would ordinarily be completed within 180 days.

None of the Commission's attempts to deal effectivly with this backlog of charges has been fully successful and this has been the source of a great deal of criticism of the Commission. Since 1972 the Commission has had five Chairmen or Acting Chairmen, and the problems of internal management and direction have been aggravated by frequent changes at the top. This has impacted on the ability of the agency to effectively respond to this mandate of eliminating employment discrimination.

Moreover, the state of the economy in the United States with its higher unemployment rate, has made it difficult for employers to meet numerical goals and for affirmative relief remedies in general.

One of the basic premises of Title VII is the encouragement of voluntary compliance with its provisions. To this end, no court suit may be filed against an employer by the EEOC until efforts at informal settlement have been attempted and failed. Even before a charge of discrimination has been filed the Commission encourages employers, unions, and others subject to its jurisdiction to take voluntary action to review their employment systems and practices. If as a result of such self-analysis, the employer finds that certain of his personnel procedures may be discriminatory, the employer is encouraged to take affirmative action to correct such procedures. The Commission may provide technical assistance if requested. In the last several years there have been challenges by white males to voluntary affirmative action who feel that their opportunities have been affected by the employer's effort to fully integrate the workforce. Although these claims, commonly referred to as "reverse discrimination" charges have been small in number, they could serve to deter employers from taking voluntary action to correct discriminatory practices. This entire issue of voluntary affirmative action is presently pending before the Supreme Court in the Bakke case. 21/

Court decisions in the last several years have been instructive as to the requirements of Title VII. The Supreme Court has held in a case alleging constitutional violations in the use of a test for employment purposes which had a disproportionate impact was not enough to invalidate the use of the procedure, as long as the test or procedure bore a reasonable relationship to the purpose it was designed to serve. 22/ The Davis case, while not a Title VII case, does discuss Title VII requirements, and many believe may have detracted from the principles laid down in the Griggs case that intent to discriminate is not necessary to prove a violation of Title VII.

One of the most significant recent developments with respect to Title VII and Commission enforcement in the area of sex discrimination, was the Supreme Court's December 7, 1976, Decision in General Electric v. Gilbert. 23/ The Court held that the exclusion of pregnancy from coverage in an otherwise comprehensive disability insurance plan does not violate Title VII. The Supreme Court determined that exclusion of pregnancy did not constitute discrimination on the basis of sex, since the G.E. disability plan covered essentially all disabilities common to men and women, and therefore could be expected to provide the same total benefits to men as a class and to women as a class.

The court held that such exclusion did not amount to a pretext for discrimination since pregnancy is significantly different from other disabilities covered in a disability insurance plan.

In its opinion, the Court struck down that portion of Section 1604.10 (b) of the Commission's Sex Guidelines which provide that disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are for all job-related purposes temporary disabilities and should be treated as such under any health, temporary disability insurance or sick leave plan available in connection with employment.

Proposed legislation is now pending before Congress to undue what the Supreme Court did in the General Electric decision. It would amend Title VII to prohibit sex discrimination on the basis of pregnancy. In that legislation the term "Because of Sex" where it appears in Title VII is to include but not be limited to "because of or on the basis of pregnancy, childbirth, or related medical conditions." It provides that women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. In a more recent Supreme Court decision, issued on December 6, 1977, 24/ the Supreme Court held that the denial to a female employee accumulated seniority on the return from pregnancy leave acts both to deprive the female employee of employment opportunities and to adversely affect her status as an employee in violation of the Title VII ban on sex discrimination. The court however held that the denial of sick leave pay to female employees on a leave of absence for pregnancy does not amount to unlawful sex discrimination unless such denial amounts to a pretext to invidiously disriminate against women.

Given the Supreme Court's decisions in this area, unless Congress acts to amend Title VII, a significant portion of female employees will be adversely affected with respect to employee benefits in the event of pregnancy.

Another significant development in Title VII law was the decision of the Supreme Court in the case of Teamsters v. United States 25/ decided on May 13, 1977.

Section 703 (h) of Title VII provides that it is not an unlawful employment practice to apply different standards, terms and conditions or privileges of employment based on a bona fide seniority system, so long as such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. Early in the history of Title VII, employers argued that they were protected under the provisions of Section 703 (h) where the employer had a seniority system which was facially neutral, coupled with no discrimination in hiring, promotion, or transfers, after the effective date of Title VII. This argument, however, was shortlived with the introduction of the theory of discrimination based on perpetuation of the present effects of past discrimination.

Beginning with early decisions, the courts held that a seniority system and a transfer system were discriminatory and in violation of Title VII, if they locked protected classes previously discriminated against into inferior positions into which they were originally placed as a result of discrimination.

Such systems, even though facially neutral, were held to perpetuate Pre-Act discrimination and therefore violated Title VII. 26/

The decision of the Supreme Court in Teamsters has severely limited the "present effects" theory. In the Teamsters case, the court held that Section 703 (h) of Title VII protects, and therefore prevents the restructuring of seniority systems, solely because such seniority systems have the effect of perpetuating Pre-Act discrimination (i.e. discrimination which occurred before the passage of Title VII of the 1964 Civil Rights Act) whereby minorities and women were assigned to and locked into essentially segregated departments with less desirable jobs and low pay. The court indicated that 703 (h) protection goes only to a seniority system not founded in or maintained for racial purposes, and would not apply to seniority systems that are themselves racially discriminatory or had their genesis in racial discrimination. However, consistent with its earlier decision in Franks v. Bowman Transportation Co.424 U.S. 747 (1974), Blacks and Spanish Surnamed Americans unlawfully refused employment in over-the-road truck driving positions after the effective date of Title VII could get relief, including retroactive seniority from the time of the unlawful refusal to hire or transfer. Thus the only persons entitled to relief under the Teamsters holding were those victims of post-Act hiring or transfer discrimination. Teamsters limited relief to identifiable post-Act victims of the hiring and transfer policies, and altered the burden of proof on the identification of the victims of the discriminatory practice. Each plaintiff or affected class member, in order to obtain relief, must prove that he or she actually applied for and was denied a job in a more desirable department after the effective date of the Act. or that he or she would have applied but were deterred by the well-known discriminatory policy of the company. This latter requirement may be a difficult one to prove. The burden of proof does not shift to the employer to show some non-discrimination reason for the refusal to hire, transfer, assign, etc. until the plaintiff has met his or her burden of establishing the discriminatory policy, the fact of a post-Act application, or some unknown indicia that he or she would have applied "but for." This burden of proof placed on plaintiffs by the decision could greatly reduce the number of persons entitled to relief under Title VII, and the amount of monetary relief obtainable.

The impact of the Teamster Decision in the future interpretation and enforcement of anti-discrimination laws involving employment cannot now be measured.

Since other employment policies do not enjoy the exemption that seniority systems do under Title VII, it would appear that under the previous theory of perpetuation of past discrimination, a present employment policy that locks in minorities and women as the result of past discrimination would continue to be held violative of Title VII, with relief limited to periods after the effective date of the Act.

In the Griggs case the Supreme Court held that disproportionate impact, and therefore discrimination, could be proved by showing a statistical disparity in the percentage of minorities hired as compared with their approximate availability in the Standard Metropolitan Statistical Area Labor market. Teamsters recognized that statistics may be used to prove discrimination, and provided further insight into what the proof must conist of. A mere showing of gross disparity between minorities and non-minorities in the work-force may not be sufficient.

The statistics must relate to Post-Act conduct. To prove a case of hiring discrimination, proof should include the number of people hired post-Act; the number of vacancies and new positions; and the percentage of minorities and women hired to fill these vacancies. The court may also look to the proportion of qualified minorities and women in the relevant labor force for the jobs in question. Employers will have an opportunity to show that the statistical evidence indicating discrimination, is a product of pre-Act hiring rather than unlawful post-Act discrimination. 27/

In June of 1977, President Carter appointed a new Chairman of the EEOC, Eleanor Holmes Norton, the former Chairman of the New York City Human Relations Commission. Since Chair Norton has been at the Commission, changes have been made in the case processing system, which are designed to expeditiously process all new charges filed with the Commission; to systematically reduce the charge backlog; to restructure the Commission's field offices and headquarters to improve delivery of services to charging parties; to provide for integration of the investigation of charges of discrimination and the litigation function in a single office to achieve more effective enforcement; to redefine the reasonable cause standard to mean that the case is litigation-worthy should attempts at conciliation fail; and to establish a program with adequate resources to work on the elimination of systemic and institutional discrimination.

The Commission, under Chair Norton has also issued proposed Guidelines on Affirmative Action which were approved in proposed form on December 21, 1977 and have been published in the Federal Register for comment. These Guidelines "make it clear that employers who do comply with Title VII voluntarily will be protected to the greatest extent possible from liability by those who may oppose or misconstrue such action. Specifically, the EEOC will find no violation if an employer conducts a self-analysis which indicates that he has "a reasonable basis for concluding" that he may be held in violation of Title VII and then taken voluntary "action reasonably calculated" to avoid the risk. 28/

It is expected that these Guidelines will encourage employers to take affirmative action where appropriate and protect them from liability on claims of reverse discrimination.

Another very important step has been recently taken in the federal enforcement effort against employment discrimination. Federal agencies, specifically the EEOC, the Department of Labor, the Justice Department, and the Civil Service Commission, after four years of negotiations, have agreed upon a uniform set of Guidelines on Employee Selection Procedures. (Testing Guidelines). When adopted in final form, they will result in all federal agencies with responsibilities in the area of employment discrimination applying the same standards in evaluating compliance with the law and making determinations as to whether violations have occurred. This will be a significant step forward in enforcement efforts, and will also make compliance easier for those subject to the law.

One of the objectives of the new adminstration is the reorganization of the entire federal government civil rights efforts. President Carter, very early in his administration, established a Task Force to review the federal effort and make recommendations for reorganization of the Civil Rights Program. That Task Force has presented its report to the President, and it is my understanding that it has recommended, among other things, that the authority of the Labor Department under The Equal Pay Act and Age Discrimination Act be consolidated in the EEOC; that the Civil Service

Commission's authority to enforce the prohibition against discriminating against federal employees be transferred to the EEOC, and that the federal contract compliance program be transferred to the EEOC.

Given the recent developments in the Title VII area, the changes being made at the EEOC, the proposed new guidelines, and the recommendation for consolidation of the civil rights efforts for more consistent and efficient enforcement, the outlook for Title VII appears brighter than it has in a number of years. President Lyndon Johnson said in 1965, in discussing Title VII:

> "Title VII of the Civil Rights Act of 1964-guaranteeing equal employment opportunities-is a key to hope for millions of our fellow Americans. With that key we can begin to open the gates that now enclose the ghettos of despair." 29/

Not only can Title VII have meaning for the minorities and women it is designed to protect, but for all Americans by allowing us to tap and productively utilize all of our human resources to the full extent of each individual's capacity.

FOOTNOTES

1. Franklin, John Hope, Racial Equality in America, Univ of Chicago Press, Chicago, 1976, p. 101

2. Schlei, Barbara; Grossman, Paul, Employment Discrimination, BNA, 1976, Wash., D.C. p. viii.

3. First Annual Report, Equal Employment Opportunity Commission, 1967.

4. 42 U.S.C. 2000e et seq.

5. P.L. 92-261, 86 Stat. 103

6. 29 C.F.R. Part 1604

7. 29 C.F.R. Part 1605

8. 29 C.F.R. Part 1606

9a. 29 C.F.R. Part 1607

9b. 29 C.F.R. Part 1602

10. Slack v. Haven
7 FEP 885 (S.D. Cal. 1973)
McDonnell Douglas Corp. v. Green
411 U.S. 792 (1973).

11. 80 Harvard Law Review 1260 (1967)

12. 279 F. Supp. 505 (E.D. Va., 1968)

13. 416 F. 2d 980 (CA 5, 1969)

14. 401 U.S. 424 (1971)

15. Section 703(h) of Title VIIprovides that it is not unlawful for an employer to give or act upon the results of professionally developed tests provided that such tests are not designed or intended to discriminate on the basis of race, sex, color, national origin, or religion.

16. Griggs v. Duke Power Co. 401 U.S. 424 (1971); Gregory v. Litton Systems, Inc. 316 F. Supp. 401 (C.D. Calif. 1970).

17. Rowe v. General Motors Corp. 457 F.2d 348 (CA 5, 1972).

18. 422 U.S. 405 (1975)

19. 97S Ct. 2720 (1977)

20. Tenth Annual Report, Equal Employment Opportunity Commission, A Decade of Equal Employment Opportunity, 1965-1975, Wash., D. C. 1976.

21. Bakke v. The Regents of the University of California Supreme Court No. 76-811

22. Washington v. Davis, 12 FEP, 415 (June 1, 1976)

23. 97 Sup. Ct. 401 (Dec. 7, 1976)

24. Nashville Gas Co. v. Satty
____ U.S. ____ (# 75-536, December 6, 1977)

25. 45 U.S. L.W. 4506 (May 13, 1977)

26. Bing V. Roadway Express, Inc. 444 F. 2d 687 (CA5, 1971); United States v. Jacksonville Terminal Co., 451 F. 2d 418 (CA5, 1971).

27. Hazelwood School District v. United States, 97 S. ct. 2736, decided June 27, 1977.

28. Statement by Eleanor Holmes Norton on proposed Interpretative Regulations Guidelines Relating to Remedial and/or Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964; BNA Daily Labor Report December 21, 1977, pp. D1-D2.

29. Speech of Lyndon B. Johnson, August 20, 1965.

ACHIEVING EQUAL PAY AND EQUAL OPPORTUNITY: THE ROLE OF PRIVATE DECISIONS AND PUBLIC POLICY

by

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I have been asked to provide a general overview of the position of women in the Canadian labour force, to evaluate the economic impact of their participation, and to comment upon the likely economic consequences of equal pay and equal opportunity.

On the surface, all this appears like a fairly straightforward task -- a few facts and a little speculation about the future. What concerns me as an economist however, is how to package such facts and such speculation. Statistics never really speak for themselves: they require interpretation. Accordingly, I propose to outline briefly the facts concerning women's position in the labour force and to spend time (1) interpreting these numbers and (2) examining the economic and political climate of the late 1970s and how it might affect further progress in achieving equal opportunity. My perspective on the past and on the near future are, of course, shaped by my training as an economist and, more specifically, as a policy analyst working in the private sector of the economy.

The Facts

- Women and men contribute to the economy through work performed in, and out of, the labour force. By looking at women's participation in the labour force, we are automatically excluding a significant portion of their contribution to the economy. Averaging the results of studies in various parts of the world, we are excluding production that amounts to about one-third of our annual output as currently measured by the Gross National Product figures.

- When the final figures on the size of the labour force in 1977 come in, about 41-1/2 percent of women aged 25 and over will have been in the labour force. The comparable figure for men of the same age group will be between 80 and 81 percent.

- Labour force participants include people who are employed or unemployed but actively looking for work. The unemployment rate for women exceeded 7 percent for all but one month of 1977, while the rate for men averaged more than 2 percentage points less.

- According to the latest figures, about 38 percent of the female labour force was in clerical occupations, with service, sales, health, and teaching accounting for the bulk of the remainder.

- Useful information on wage differentials between women and men is not as recent. Although raw data on such differentials are available, it is, in my opinion, quite misleading to draw conclusions based on comparisons of unadjusted differentials in wages and salaries earned by women and men. Differences in rates of part-time work, education or training, and seniority may all account for part of the observed differences. The data required to make the necessary adjustments are only available from the Census. On the basis of data that became available in 1975 but were based on Census questions asked in 1971, a conservative estimate of the average adjusted differential was 10 percent. That means, of course, that the differential for some women was zero while for others it exceeded 10 percent.

Assessing the Past

These patterns are not very different from what you already know or would have expected. The question is, how should the figures be interpreted and how, therefore, should progress concerning women's position in the labour force be judged? This is precisely the question that I anticipated when planning the book Opportunity for Choice -- a book designed to use Statistics Canada's statistical base, and especially the 1971 Census, as fully as possible to explore the role of women in the Canadian economy and society. What I anticipated was one of my colleagues looking over an elegant display and analysis of statistics and saying, "Well, so what?" It was to answer this question that I developed a response that satisfied me.

I concluded that many of the statistics could not be judged as good or bad in and of themselves. This is particularly true of rates of participation in the labour force and of characteristics of this participation, such as whether it involved part-time or full-time work. Should, for example, greater participation in the labour force by married women with young children be considered good or bad?

This led me to redirect attention from the statistics to the underlying explanations for the statistics. If the criterion of equal opportunity for choice for women and men were fulfilled, the resulting statistical patterns would be appropriate by definition. Equal opportunity for choice was defined as a condition that would be met if the whole range of advantages and disadvantages and costs and benefits of particular choices were unrelated to one's sex. When decisions by girls and women are made when facing the same encouragement, opportunities, and constraints as for boys and men, we will have achieved equal opportunity for choice. The goal corresponding to this criterion is to expand the range of effective choices open to both women and men in Canada.

By focusing attention on the underlying reasons for the statistical profiles that we observe, one emphasizes that the entire explanation for women's labour force patterns cannot be found in the form of barriers in the labour force alone. Responsibilities in the home and general attitudes in society affect our choices and our constraints and are reflected in many ways in labour force patterns.

Reminding ourselves of these simple realities must inevitably temper our expectations from the type of legislation that characterizes Canadian jurisdictions. It is essential to have the best possible legislation and to have it fast. We cannot, however, expect the pay-off from that legislation to show up immediately in dramatically altered statistics on labour force participation, occupational distribution, or average wage and salary levels. Rather, legislation, at its best, can be regarded as a reflection of the acceptance of the equal opportunity concept in its broadest sense, and more practically, as a catalyst for change that will spawn still further change.

The fact that discrimination in the labour force reflects attitudes that are grounded in society generally also suggests that we cannot restrict our efforts to making changes in the conditions affecting the labour force alone. Simultaneous efforts must be made in all those of our institutions that have shaped aspirations and goals and have perpetuated invisible but powerful barriers that prevent women from being offered or even, in many cases, accepting certain types of responsibility or expanded opportunities.

Problems still exist for women in the area of access to certain types of occupations and in achieving equal pay for work of equal value. There is, in addition, a sentiment developing in some quarters that would challenge some women's right to be employed at all at a time when Canada is experiencing an 8.5 percent unemployment rate.

Since jobs provide the source of livelihood for most Canadians, the great political concern over the unemployment rate is generated by its reflection of the economic burden being borne by Canadians. It is quite natural, then, for economists and politicians to try to compare the burden reflected by an 8.5 percent unemployment rate in 1978 with a similar rate fifteen or twenty years ago. In the process of making such comparisons, however, commentators often depart from the facts and from sound analysis. For example, it is noted that a higher percentage of the unemployed than in the past are accounted for by women and youth. It is then assumed by many that these women and youth are secondary workers and economically dependent on husbands or fathers. Accordingly, the conclusion is drawn that the burden of their being unemployed is less and we can therefore define away part of the burden represented by an 8.5 percent unemployment rate.

Even more serious is the extension of this argument to suggest that men ought to have priority over women in filling the available jobs.

Now, it is quite true that:

- an overall unemployment-rate figure is not very meaningful in assessing economic burden and should be supplemented with such information as duration of unemployment and numbers of employed persons in the family.

- there are more women who are totally economically dependent than are men.

But, it is also true that:

- some women have complete financial responsibility for themselves and their families, and

- a significant number of women are contributing jointly to family income, without which their family would be in financial difficulties.

We must make up our minds. If jobs are to be held on the basis of one's ability to do the job, then let us use that criterion consistently for women and men. If jobs are to be allocated on the basis of economic necessity, then let us use that criterion for both women and men and not resort to the incorrect generalization that men alone bear the economic responsibilities in the Canada of 1978. Facts, and not assumptions, are required when such basic decisions are being made.

Speculation about the Future

Following this brief profile and assessment of the important indicators of women's position in the labour force, I think it is useful to examine the role of governments in generating further reform and change in the future.

Let us look first at the government-expenditure situation, where we find a bleak outlook for those desiring new or greatly expanded expenditure programs. Governments at all levels are under continuing pressure to reduce their increases in spending. This pressure is a response to the view that part of our inflationary problem emanates from the unwillingness of Canadians to cut down on private expenditures to accommodate increased government

expenditures. Accordingly, the obvious conclusion is to keep government expenditures in line.

This pressure to reduce government expenditures, when combined with government's commitment to expenditure programs that grow automatically in line with inflation rates and to a tax structure that is indexed to reduce the tax take from pure inflationary income increases, means that funds will be tight.

In this context, I see little likelihood that supporters of publicly financed day-care centres can expect significant assistance from governments.

In addition to their ability to subsidize, however, governments can choose the route of legislation, which, in some cases, can involve less outlay of money because it imposes the costs on businesses. Here, again, I see little chance that there will be dramatic new initiatives in the form of new affirmative action legislation in the near future.

The drop in the value of our dollar from about $1.03 to just over $0.90 U.S. has been a dramatic indication to Canadians that we have not been competing very well in international markets. The Canadian business community has been arguing quite consistently for the past couple of years that government policy and specific regulations have hamstrung Canadian businesses and prevented them from meeting the standards of our major competitors.

You may choose to emphasize alternative sources of our economic difficulties. All I offer here is that the perception of governments' overgoverning is widely held in certain parts of Canadian society and must inevitably nurture a resistance to measures that suggest detailed directives as to the makeup and use of the labour force in the private sector.

My message is clear. I think that we have entered a different ball game in the second half of the 70s and will not return in a hurry to the days of expanded social programs and new legislative initiatives of the late 1960s and early 1970s. Although this may appear to be a pessimistic evaluation of the future, and I guess it is, it does not imply that there is no room for manoeuvering. Recognizing the constraints is only the first step. The next step is to work as effectively as possible to modify and thereby improve existing legislation and to use existing allocations of government funds even better than before. To those with a long-run interest in political movements the events of the late 70s suggest that there is no substitute for a strong constituency, especially in economically difficult times.

Conclusions

My remarks suggest the following conclusions:

- Women contribute massively to the Canadian economy both in, and out of, the labour force.

- Many women who by choice or necessity are already in the labour force are capable of contributing even more, while many women already contribute more than is reflected in their earnings.

- Both analysts and political activists must be aware not only that old myths must be shattered but that new myths, such as the lack of burden of high unemployment rates on women, must be prevented from taking hold.

- In economically difficult times, efforts to achieve one's goals must be

adapted to deal as effectively as possible with the constraints.

- Finally, one's eye must be focused squarely on the objective. For me that objective is to achieve equal opportunity for choice and to go beyond to expand the range of effective choices for all Canadians.

ENFORCING EQUAL PAY AND EQUAL OPPORTUNITY LEGISLATION: MISSION IMPOSSIBLE?

by

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My interest in the subject of enforcing equal pay and equal opportunity legislation was piqued by what I thought would be a simple exercise. At one point I undertook to find out how often complaints had been laid under this type of legislation in Canada, thinking that the number of complaints registered was some sign of the usefulness of the legislation. My theory at that time was that the more complaints there were, the more useful the legislation must be - or must have been thought to be by those persons it was intended to benefit.

Trying to follow this theory to its logical end brought a few surprises. To begin with, it proved rather difficult to find complete and accurate information in publicly available sources. I had thought that the annual reports of the Departments of Labour for Canada and the provinces, dating from the introduction in each place of equal pay legislation, would be good sources of information about equal pay complaints. Unfortunately, these documents for the province of Alberta, from 1957 when its equal pay legislation was first enacted, were not available in any of the four libraries I consulted. 1/ The reports of the Commissioners of the Yukon and the Northwest Territories for the years in question do not break down the enforcement activities of labour standards officials by types of cases. The annual reports of the Manitoba Department of Labour for the relevant years were not indexed or broken down by topic. Various other problems arose: changes in the method of reporting information from year to year within the same department; the omission to mention equal pay legislation or enforcement for years on end; and minor inconsistencies in the annual reports themselves. Perhaps we will never have the full picture of enforcement activity in Canada. Yet some interesting features do emerge. The jurisdictions dealt with here are Canada, British Columbia, Ontario, Saskatchewan, and Nova Scotia. They were chosen because their annual reports were readily available and appeared reliable.

The Pattern of Complaints

Equal pay legislation was first in effect, in British Columbia in 1953. Between 1954 and 1968, a period of fourteen years, there had been only 37 formal complaints of violations, involving eleven employers. 2/ Twenty-seven of these, relating to five employers, were received in 1954, two in 1955, and five in 1956; leaving only three complaints over the next twelve years. 3/ In many of those years there were no complaints at all. In the years since 1968, it would appear that complaint activity jumped sharply: in 1970, there was one complaint involving seven radiology attendants; there were six complaints investigated in 1971; at least one in 1972; seventeen in 1973 and twenty-eight in 1975; as well as 342 complaints from hospital workers settled in a separate proceeding. 4/ Leaving this large settlement aside, and allowing for difficulties in getting reports or numbers for 1969, 1972 and 1974, it seems that at least fifty-eight people have complained in the six years from 1969 to 1975.

A somewhat similar pattern exists in Ontario, another jurisdiction for which there are reasonably good records available in the annual reports. In the first fourteen years of equal pay legislation in Ontario, from fiscal 1951-52 to 1965-66, there are 152 recorded complaints. Fifty-two employees of one employer complained in 1952-53, and sixty-nine complaints were received in 1953-54, leaving thirty-one remaining complaints distributed over the other twelve years. Twenty-five of these were in 1964-65 and 1965-66, leaving a space of ten years when there were only six complaints altogether. 5/ Activity in Ontario apparently began to pick up around 1966-67. In that year there were eighty-nine complaints, 6/ and in 1967-68, a total of 165 complaints. 7/ From the annual report for 1969-70 onwards, the figures are reported not in terms of numbers of complaints laid but in number of employees benefitted by some monetary recovery from employers, along with the total amounts recovered. These are rather larger figures than the ones we are used to. 8/

Table

Year	Number of employees benefitted	Amount of award
		$
1969-70	836	94,398.38
1970-71	1,129	477,415.07
1971-72	3,673	488,615.52
1972-73	176	37,154.20
1973-74	409	547,191.72
1974-75	114	40,211.19
1975-76	19	31,248.88
1976-77	452	535,966.02
TOTAL 8	6,808	$2,252,200.98

This averages out at 851 employees benefitted each year, with the average annual recovery being $281,525.12. While better than the previous record, one wonders how this figure compares to the average annual cost of collecting this money from employers.

I could find nothing in the annual reports of the Saskatchewan Department of Labour about equal pay complaints for any of the years from March 31, 1954 through March 31, 1973. With the formation of the Women's Bureau in 1964-65, the annual reports began to contain notes about it assisting in interpreting legislation and solving problems. 9/ With the start of job audits by the Women's Bureau in 1973, we begin to see production of statistics like those in Ontario. In the last three months of 1973, twenty-one women got $7,073.88; in 1974-75, the monetary recovery was $41,158.00; and in 1975-76, thirty-four women got $37,400.62 in back

wages. 10/ In Nova Scotia, the annual reports covering the years 1956-57 through 1967-68 do not report any equal pay complaints. 11/ By contrast, in the last nine months of 1968, twenty-five women complainants were dealt with, and from 1969-70 through 1975-76, there were 126 complaints, albeit only 15 successful ones. 12/

The reports of the Canada Department of Labour are an interesting study. After reporting for the fiscal year ending March 31, 1957 through the year ending March 31, 1966, 13/ that no complaints had been lodged under The Female Employees Equal Pay Act, 14/ the annual reports thereafter ceased to report any statistics on equal pay, even negative ones, while still recording Departmental responsibility for administration of equal pay provisions. 15/ The only cases I can think of in the time covered by these unhelpful reports, down to 1976, are the unsuccessful complaints of Joan McLellan 16/ and the female employees of Bell Canada. 17/

These statistics, imperfect though they are, intrigued me, and today I am presenting my preliminary speculations about the reasons for this pattern of very little employee-initiated enforcement -- and thus very little enforcement -- during a long period of the history of equal pay legislation, coupled with a minor "boomlet" of employee-initiated and other enforcement activity around the end of the nineteen-sixties and into the nineteen-seventies. I want to emphasize, however, that compared with what might conservatively be called "the problem", our record of monetary recovery, as indicated by the Ontario, Saskatchewan and Nova Scotia figures, is still not a good one, given the costs to the government of enforcement activity.

In trying to assess the reasons for the pattern described here, I must admit that the only hypothesis for the comparative disuse of the legislation by employees, which I rejected, was the notion that they did not need it. In other words, I did not suggest to myself, and do not suggest to you, that employers were doing such a good job of voluntary compliance in the 1950's and 1960's that employees did not feel the need to resort to complaints. The reasons, I would think, lie elsewhere. Perhaps women were unaware of the legislation providing for equal pay or unsure how and where to complain; perhaps they feared reprisals for making trouble; perhaps some made a conscious decision that the benefits to be had from a successful complaint did not outweigh the costs in terms of aggravation, time lost, out-of-pocket expenses, and lengthy exposure to hard feelings at the workplace. Nor can one ignore the potential effect of a general lack of militancy on the part of Canadian women during these years. Certainly the jump in complaints coincides with the development of activity which produced the appointment of the Royal Commission on the Status of Women.

All but the last of these possible reasons can be traced back to a more basic reason: the nature of the legislation itself. Aspects of the legislation may have hampered its becoming well-used and thereby well-known. Legislative provisions leading to lengthy or

fruitless enforcement procedures, prolonged jeopardy from the employer with slender hope of reward and much to lose if unsuccessful, could, once discovered, deter further interest in pressing a complaint. These features, one can suggest, would have a cumulative effect: the less the legislation was used, the less it would be used; the less it would be used, the more difficult it would be for administrators to muster the enthusiasm or the budgets to generate renewed public interest in the legislative remedies. The increased use in the late nineteen-sixties suggests that the emerging confidence generated by the women's movement may have had a useful corrective effect on the problems discussed here.

Legislative Impediments to Enforcement Activity

The legislative features that might be relevant to our puzzle fall into two broad categories. First, there are the substantive provisions of the legislation and secondly the procedural ones. Generally, we have concentrated on the substantive provisions when seeking to explain the long disuse of equal pay legislation. It is difficult for the employee to establish compliance with standards affording equal pay for the "same work" or even for "substantially the same" or "substantially similar work". First, there must be a male in the same establishment with whose job the woman's work can be compared, and secondly, that comparison must show not only that the jobs are of the same kind, but also that in each of the three areas associated with the standard - skill, effort and responsibility - the jobs compare favourably. Segregation of women into job ghettos is the obvious hindrance to finding a male for comparative purposes. This fact may itself go a long way in explaining the lack of use of equal pay legislation: women could easily verify whether they passed this threshold step. The difficulty of proving the requisite degree of similarity on all three elements is poignantly illustrated by the Ontario case of Daisy Morant and The Oshawa Times. 18/ In this case, a family editor of a newspaper was found to exercise more skill and the same degree of effort as the sports editor, but was not entitled to equal pay because the sports editor had more responsibility. We can also note the frequency with which the meaning of the statutory standard of "same", "similar" or "substantially similar" has been at issue in cases before boards and courts and the complexity of the exceptions to the equal pay requirement for factors other than sex that justify the difference in wages.

The difficulty with the standard of conduct expected is thus twofold: first, it is too narrow, and secondly, it is not clear enough. In a study of the Federal Energy Administration done by a Task Force appointed by President Ford, it was pointed out that one of the keys to enforceability of a regulatory provision was that it be unambiguous. 19/ The need arises on two fronts. First, the likelihood of compliance with a clear standard is increased among people of goodwill because they know what is expected. A clear standard also affects the conduct of those who might be tempted to avoid compliance and wait to be forced. Protracted legal argument about the meaning of

a standard will not be available to an employer as a delaying tactic or a strategy to avoid compliance where the standard is unambiguous. On the other hand, if a company knows that such strategems are available in the event of detection, so that it may escape the consequences of breach altogether with the expenditure of some legal fees, then its incentive to comply at the outset is reduced. Compliance will seem to cost more than the fees required to escape liability in the event of detection and the fees will seem smaller the longer one is able to avoid paying the higher wages required by "equal pay".

There has been in Canada over the life of its equal pay legislation, a gradual broadening of the standards governing equal pay, moving away from the early equal pay for the "same work" to the modified "similar work" or "substantially similar work". 20/ This movement, while good in its own right, certainly does not remove other substantial difficulties with the legislative standards. The need to establish similarity in each of the three categories of skill, effort and responsibility, as well as a basic sameness of type of job, is still with us. So too are problems of the exceptions to the statutory standard, most critically the exception which allows differences based on "a factor other than sex", that justifies or normally justifies the difference.

The difficulty caused by the "factor other than sex" exception is more than amply illustrated by the case of Re A.G. for Alberta and Gares et al. 21/, which was heard in the Supreme Court of Alberta. In this case, which involved a complaint by seven nursing aides that were not being paid wages equal to nursing orderlies doing similar work, there was no serious contest on the main issue. The hospital admitted that the work was the same, and that the women were paid less. Nonetheless, there was an investigative and conciliation stage extending from the complaint on April 24, 1973 to June 25, 1974 when, a two-day hearing began before a board of inquiry. Eventaully there was a trial de novo before a Supreme Court justice lasting twenty-one days and involving eight full-time counsel. The decision was issued on January 27, 1976. The lengthy process was caused by the eventually unsuccessful allegation that the existence of different collective agreements with the male and the female employees setting out the differential rates, was a factor other than sex which justified the difference. I do not wish to belittle the importance of clarifying the relationship between collective bargaining and human rights legislation. I also should point out that the procedure established by the legislature for enforcing this Act, was protracted and cumbersome. However, the Gares case is a near classic example of an employer taking advantage of an ambiguity in the statutory standard once it has been caught in an apparent breach of the Act.

The Gares case introduces the second major problem area in equal pay and equal opportunity - enforcement. This is the procedure provided by the legislature for enforcing the substantive provisions. When, as in equal pay, the problems of interpretation in the standards are themselves complex, the nature of the enforcement mechanism takes on added significance. We can suggest that the employer's incentive to ignore

legislation may be increased by providing many stages in the enforcement process at which he or she can raise questions of interpretation similar to the one raised in the Gares case. An obvious corollary is that the employee's sense of the worth to her of lodging a complaint, will go down.

My long-range aim in this area is to do a systematic study of the "formal features" of equal pay and equal opportunity legislation in Canada, which could determine with greater accuracy the relation between the enforcement mechanism provided by the legislature and the employee's use of the legislation. 22/ At this stage, however, I wish to share with you the premise upon which I approach the question.

A Fundamental Contradiction

It is my belief that there is a fundamental contradiction between the policy that seems to underlie the expressions of legislative intent, in the part of the statutes, that discuss substance and the enforcement mechanisms that have been provided in most Canadian legislation. This contradiction has been somewhat mitigated in recent years by the modification of the enforcement procedure introduced in many jurisdictions; the greater awareness of women dating from about the nineteen-sixties and, in some jurisdictions, at least, a greater commitment to enforcement of human rights laws in general; and to the serious enforcement of laws relating to discrimination against women. I say that the contradiction has been mitigated; it has not been removed.

On the one hand, we appear to have social policy of a redistributive nature. "Equal opportunity" policy can be said to aim at a "redistribution of chances" in society - chances for employment, for promotion, for training, and so on. Equal pay policy in its cautious way aims at moving dollars from employers to the women doing work. In this way, women with substandard wages (the standard being male income for the same job) do not, in effect, subsidize the employers operation or the consumer's eventual price. Taken in isolation, then, from their enforcement mechanisms, the legislative endorsement of equal pay and equal opportunity provisions means some commitment - however timid - to redressing class imbalances in economics and society. Particularly with regard to employment-related remedies, the group or class focus is clear. Some jurisdictions exempt from coverage of labour standards and other laws, employers with fewer than a minimum number of employees. That there will be a number of persons affected by the policy of a single employer is thus implicit in the legislation.

These policies, aimed at benefitting classes or ending discrimination based on class membership alone, are not, however, implemented in a way that shows much awareness of the group factor in the policies. The legislature has chosen to follow that most individualistic and isolating method of procedure; that of traditional litigation. This is not to say that the legislature invites employees to go to the courts for enforcement of equal pay or equal opportunity legislation.

Rather, the problem-solving method usually associated with the courts has been brought into the human rights area.

The classic model of litigation pits one adversary against another, before an impartial decision-maker. Attempts in litigation in courts to get away from this individualistic approach and toward class and representative actions have met mixed success. The litigation model stresses individualism, and puts a premium on the strength of the individuals involved: personal strength in the sense of being able to bear the strain of the process; economic strength in the sense of being able to finance it and to exist during the process without the gains one hopes to get from litigation; and what might be called the strength of the case - the merits of the factual and legal position of the parties. Sometimes, the strength of the case may not be fully demonstrated if shortfalls in economic or emotional resources force an early settlement.

This highly individualistic litigation model, in more or less modified form, lies at the heart of the equal pay and equal opportunity enforcement process. In most systems, a complaint is lodged with a government agency which is charged with the initial job of investigating the complaint --fact-finding -- and attempting a settlement. At this stage, it is perhaps not too clear how the litigation model is showing up but let me suggest this: this preliminary official is the fact-finder and decision-maker all at the same time, determining what sort of settlement is appropriate, and urging the parties one way or another depending on his or her view of their respective strengths. It is an anomalous position and leaves no party's interests fully protected. It may be hardest on the employee who needs to look to the government official as her advocate because she cannot afford a lawyer, does not belong to a union or can't get her representative injected into the proceedings in a meaningful way.

If settlement is not achieved, and if the government official continues to believe that the employee has a good case, the next stage in the proceedings is usually a board of inquiry, and here the litigation model is more apparent. The hearing before an ad hoc appointed board or before the Wages Board or the Human Rights Commission, is conducted as a trial would be, with each side presenting evidence, cross-examining, offering argument, and so on. Here, the role of the original authority is not so much that of fact-finder and decision-maker, but that of advocate for the employee's case, which by surviving through the intake and attempted settlement stage, may have "earned" the representation of the Human Rights Commission or Department of Labour. Significantly enough, the litigation model is modified here: the employee does not have to pay the Department or Commission and thus has a boost-up in economic strength (which may not unfortunately be total because of the other economic costs associated with litigation).

In return for this boon, the employee may give up an important feature of the relationship between a private client and her lawyer: the right to control the course of the litigation by making, or being involved in, key decisions.

From the board of inquiry stage, a case may go to the Human Rights Commission or a court for a final order; or the board may make an order itself from which the only recourse is an appeal. Whether the appeal is to another administrative agency, or as is likely by this stage, to a court, the hallmarks of the litigation model are again apparent.

This method, with its close parallels to the civil litigation model, may not be an unsatisfactory approach to resolving individual cases. Action in particular cases, as mentioned above, is the special feature of the judicial system. One can, however, seriously question the wisdom of proceeding only on an individualized basis in the area of equal pay and equal opportunity, because of the fact that discrimination may be occurring with regard to a number of employees, all more or less similarly situated. In order to achieve justice for individual employees, a change in or from the litigation model may be necessary. Some features which should be examined are outlined below.

My criticism of the litigation model does not end with the notion that it may not now work effectively to produce justice in the individual case. The legislatures of most jurisdictions seem to have chosen the litigation model as the sole method of achieving the goals implicit in the legislation: equal pay and equal opportunity for women. Outside the government's own civil service, where efforts toward these goals seem to be proceeding, signs of government commitment to them are few. Recent cutbacks in day care funding might even suggest a reduction in commitment to the equal opportunity of women workers.

We have seen in other areas the weaknesses of litigation as the sole method of developing and implementing policy. A system dependent on litigation for opportunities to develop more fully its understanding of existing law is essentially reactive. It must wait until someone comes to it with a complaint that merits its action. The development of doctrine and the articulation and implementation of policy, are thus slow and somewhat haphazard in any system based on the litigation model.

I rather doubt that all the legislatures in Canada have made the deliberate choice that the development of equality in the workplace should be slowed down by being entrusted only to the enforcement mechanism of equal pay and equal opportunity legislation. The enforcement mechanism was probably developed without anyone thinking that it would be just about the only string to the "equality bow". Its dual role does, however, create added problems, particularly for the individual seeking a remedy in her own case. She is really the one who shoulders the burden of developing our understanding and our policy in this area. To say that this was not a deliberate act of cynicism on the part of governments does not free them from the responsibility of taking action to distribute the burden more equitably.

Individual Action in the Complaint Process

Originally, most equal pay and equal opportunity legislation specified that only the individual affected could lay a complaint. When most of the employees of one employer were aggrieved, all had to make complaints. Hence the early statistics showing fifty-five individual complaints against a single employer. The necessity of identifying oneself as the source of government activity against an employer may well have had a substantial deterrent effect on potential complainants.

Another difficulty arises from a requirement for individual complaints. A board seized of only the complaint before it, cannot make a binding order affecting other employees. At the moment it appears limited to recommending that the enforcing authority pursue the other cases by way of its power to initiate cases on its own. This, however, may not be done, especially without followup pressure by the public or the group of employees concerned, because of other priorities and resource constraints. An ironic and unfortunate instance of this problem arose again in the Gares case. Seven employees of a hospital believed they were making a representative complaint on behalf of all, and the Commission also appeared to appreciate this but never notified the employer that the cases of the over 300 other employees were also at issue. Accordingly, at the judicial trial de novo of the matter, Mr. Justice McDonald felt he could not make any back pay orders for any but the seven-named complainants. This award proved to be just under $14,000 altogether. As for the others, moral suasion was the only recourse, although it was the failure of the Human Rights Commission that led to the mixup.

The tragedy of the case is that, throughout, the seven complainants were meeting an employer who knew full well the large scale implications of a decision in their favour. The hospital argued that a finding adverse to it would necessitate not only back pay to the seven, but parity for all the female nursing aides and adjustment of all the salary scales that related to the aides' pay. The hospital saw its cost of this at somewhere over a million and a half dollars. The seven complainants thus had the worst of both worlds: they faced an adversary whose determination to fight may well have been hardened by its awareness of the larger implications of a decision in their favour, but did not succeed in getting the large award when they won their arguments.

The costing done by the hospital in the Gares case showed that the aides were part of a pay structure that had discrimination at its root. Nurses' salaries in the hospital were, historically, a given percentage higher than the aides', and therefore a smaller percentage difference in salary existed between the nurses and the male orderlies, who were paid more than the aides for the same work. We know from the subsequent court case of Re Civil Service Association of Alberta, Branch 45 and Alberta Human Rights Commission et al. 23/ that a very similar situation existed in at least one other Alberta hospital. Indeed, the government itself sponsored separate training programs for aides and orderlies in the province, and the programs were effectively segregated on the basis

of sex. The difficulty of impinging on this structure of discrimination by way of individual complaints is obvious. The advantage to an employer of large numbers of people in proceeding this way is also obvious. Confrontation on a case by case basis means that the cost of being "found out" in a breach of legislation will almost always be lower to the employer than the cost of voluntary compliance. This imbalance is certainly no incentive to voluntary compliance.

In equal pay and equal opportunity cases, there is likely to be an initial disparity in economic power between the employer and the employee. Most of the cases which have gone to the board of inquiry stage have involved relatively low paying occupations: waitress, store clerk, building cleaner, nurses aide and other female health workers, and so on. The out-of-pocket expenses in pursuing a claim, in terms of long distance phone calls to the human rights commission, travelling, and time off work, can bear an uncomfortable relationship to the weekly wage for such an employee. The complainant in the Nova Scotia case of Grandy v. Atmus Equipment, 24/ for example, made $127.55 per week and had an approved bill of expenses, apart from any legal costs, of $357.56.

The employee may also fear the not unlikely consequence of reprisals from the employer, who holds her future economic wellbeing in his or her control. Such sanctions do not have to be the crude act of firing, and may not happen within a few months of the complaint. Missed promotional opportunities, guarded letters of reference, and informal blackballing among employer networks are all instruments of the employer's superior economic power. Some fears are real even though unfounded. It is not inconceivable for example, that immigrant women would refrain from reporting a violation for fear of adverse reports to "Immigration". Of course the position of illegal immigrants is worse.

The individualized nature of the complaints process, then, is oddly suited to the achievement of justice for a class of persons. It is not even very well suited, as these few examples have shown, to achieving redress for affected individuals, singly or in groups, because it emphasizes the economic disparity between the employer and the employee and gives the employer an added incentive for relying on that disparity to stymie enforcement efforts. Perhaps a classic example of this is a briefly reported case of an equal pay complaint in Nova Scotia, in which the employer removed women workers from their jobs rather than pay them the equal wages they had claimed. 25/ Without equal opportunity legislation at that time, or effective safeguards against reprisals, the women had no recourse.

Within the litigation model of enforcement, adjustments can minimize the kinds of problems described here. Employees can be given some anonymity by permitting complaints to be lodged by third parties or by the enforcing authority itself. Many jurisdictions now facilitate third-party complaints. The enforcing authority's power to initiate complaints of its own motion was held in the Re Civil Service Association case 26/ to allow the Alberta Human Rights Commission to accept a complaint from a union on behalf of its members even though the statute did not allow third party complaints per se.

Permitting class complaints, and class recoveries or orders against an employer, is another way of alleviating the pressure on the individual employee. It is difficult for someone to take reprisals against a whole shop or section. In addition, the awareness of possible large recoveries might spur employers to voluntary compliance. Legislation may authorize class actions and class recoveries. On the other hand, any enforcing authority, with legislative power to initiate action on its own could ensure that a complaint proceeded on a group basis.

In addition to class or group recoveries, there are other means of increasing the cost to employers of non-compliance with legislation. The maximum fines provided upon conviction for breach of legislative provisions are shown in the Table below. In many cases, these fines may amount to no more than a licence fee for discrimination. 26/

	EQUAL PAY		EQUAL OPPORTUNITY	
	Individuals	Corporations	Individuals	Corporations
	$	$	$	$
British Columbia	1,000	5,000	1,000	5,000
Alberta	200	1,000	200	1,000
Saskatchewan	100-500	400-2,000	100	500
Manitoba	500	500	100-1,000	500-5,000
Ontario	10,000	10,000	1,000	10,000
Quebec	?	?	?	?
New Brunswick	100	100	500	2,000
Nova Scotia	100	100	500	1,000
Newfoundland	100	500	100	500
Prince Edward Island	100-500	200-2,000	100-500	200-2,000
Canada	50,000	50,000	50,000	50,000
Yukon	1,000	1,000	100	500
North West Territories	100	500	100	500

One method of removing the onus for enforcement from the individual lies in the practice of some enforcing authorities. Systematic inspections of employers, launched at the initiative of the government authority, remove any suggestion of employee complaint. One employer, Jack Hall of Sanitary Cleaners in St. John's, Newfoundland, has outlined the advantages to employers of this kind of enforcement program. 27/ He told the Newfoundland Human Rights Commission that acting only on individual complaints puts the employer of a successful complainer at a competitive disadvantage with firms whose employees are less vociferous, particularly in industries where there is competitive bidding. Government sweeps of whole sectors would put all firms on an equal footing.

Before concluding, there are two more observations which are relevant to our discussion of the litigation model. One is that the introduction of the conciliation step at the outset has robbed the human rights enforcement process of two of the real strengths of the litigation model. Another is the value of publicity. Conciliated cases are not always widely publicized and sometimes don't even rate an entry in the department's own report. In litigation in court, public debate of issues that become sharply focussed by the adversary process may be encouraged, and valuable publicity for the principles can be had. Secondly, a conciliated case has little precedent value, because it is usually not publicized and because the result depends so much on the particularized dynamics of the situation that it is easily explained away. As long as there is an individualized system of enforcement, workers need exemplary cases which will encourage them to seek their own rights, and which will make employers believe in the possibility of their success. Thus conciliation which was no doubt intended as a benevolent step by the legislators who adopted it, sits oddly in the litigation model and neutralizes some of its effective features. The idea of settlement is of course not foreign to lawyers and their clients in the "real world" of litigation, but "good settlements" are most often achieved when the bargaining strength of the parties is roughly equal. Choice of the individualized litigation model in the first place, and its details in some statutes, make this equalized bargaining strength a fond hope.

Secondly, one can observe that enforcing authorities faced with the contradiction between the group aims of human rights legislation and individualized enforcement have an uphill battle. It is my view that their role in the investigation and conciliation stage is anomalous and fraught with problems. It is likely to be difficult to avoid giving both the employer and the employee the idea that the other side is being preferred. Moreover, a department branch or board may have many cases on the go at once. Each employer, some with vast resources, has only one - usually involving only one employee and a comparatively small potential penalty, but providing sufficient motivation to devote resources to fighting it. Some enthusiastic enforcement efforts may, as illustrated in the case of Re University of Saskatchewan v. The Saskatchewan Human Rights Commission, 28/ infringe rules of law designed to safeguard the position of those whose rights, economic or otherwise, are being broached by government. Appropriations may be small, and the agency has the odious task of allocating enforcement priorities among various minority groups. The individualistic enforcement scheme accepted by most governments in Canada, then, including its funding, seems to demand of enforcing authorities a high degree of industry, dedication, fairness and tact, while government policy in funding and the policies themselves can thwart the seriousness of efforts to achieve these. The agencies' delivery of these commodities cannot always be assured - especially in a government where bright and ambitious young people may realize that long-term career advancement lies outside the low priority area of human rights.

Recommendations

What then can be done about this essential contradiction? Legislatures can continue their efforts to mitigate it by adopting measures to make enforcement procedures less lengthy, less individualized and less threatening to the individual by improving protections against reprisals like those outlined above. On a practical level, it can provide human rights commissions and departments of labour with increased resources that will allow speedier processing of complaints and greater use of government-initiated inspections. All of these steps will be of some real help to individuals who must use the "litigation" model to seek redress.

Ultimately, however, governments must accept that the policies it has espoused do involve group exigencies and require movement beyond an improved human rights enforcement system based on individual action. Individualized mechanisms are just not enough for the achievement of the social policy goals, and different kinds of government action become necessary then. It is apparent, for example, that large numbers of the equal pay complaints across Canada have come from women hospital workers, whether they be medical workers or cleaners, and from cleaners in other institutional settings. A large settlement in British Columbia negotiated by the Minister of Health, the Hospital Workers Union and the Director of The Human Rights Act following receipt of 342 complaints secured retroactive pay raises for every female hospital employee in the Province earning less than the male base rate, a total of $5 million for 8,000 employees. The judge hearing the appeal de novo in Gares suggested that regulations could be passed under s.11 of The Individual's Rights Protection Act 30/ setting non-discriminatory salary scales for hospital workers, and in 1974, the Report of the Hospital Inquiry Commission in Ontario recommended the implementation of a comprehensive job evaluation scheme in Ontario hospitals and stated that those in charge of developing it should "pay particular attention to developing classifications that sweep away any existing ones which serve to perpetuate pay differentials for work of substantially the same content". 31/ All three approaches are predicated on some simple facts: the government itself through a department, agency, or corporation is involved directly or indirectly in discrimination; the problem is wider than the individual case; and class solutions are needed. A real push by all governments to equalize the salaries of women workers in these categories is possible if the government does not want to contine subsidizing health care by paying low wages to women caught in structural ghettos. It is also desirable, because it would have the effect of injecting into the labour market an array of jobs, which range from not very skilled to para-medical, for which women are paid fair wages - and against which other employers would have to compete for mobile labour. Such action by government would also free the resources of the labour departments and human rights commissions to concentrate on other sectors.

I also think that other more general government initiatives could be taken which are predicated on the need for group action. One of these is providing a tax deduction for employers performing in accordance with an affirmative action program approved by government. The tax deduction would be some recognition of the costs to employers of wide-scale removal of discrimination against women and thus should be available only to those making extensive efforts to remove structural discrimination. The advantage of the tax deduction is that it would offer a real incentive for meaningful action by employers, instead of working only to increase the disincentives to violation, of the strict requirements of the law. It would also shift the initiative from the individual and the agencies to the employer. This scheme, in my view, has advantages over contract compliance and other types of affirmative action in that it is, given appropriate financial incentives, almost completely self-enforcing.

The last recommendation departs somewhat from the enforcement orientation evident up to now, and returns to the problem of standards. Whole groups of women are excluded from present equal pay legislation because there is no male in their sex-segregated department against whose work they can compare their own. For some women, breaking out of these ghettos by resorting to equal opportunity legislation may be the answer to this problem. Certainly, once equal opportunity legislation began to protect against discrimination in hiring promotion and training on the basis of sex and marital status, women began using the legislation at quite a substantial rate. Yet equal opportunity legislation may be too individualistically oriented to make much of an impact on structural discrimination: even a class order allowing all women to apply for a formerly male job may result in only very gradual recruiting of women out of their traditional areas. There may, as well, always be a supply of manipulable female workers waiting to take the places of those who leave, particularly in jobs like waitressing, cleaning, light manufacturing and the garment industry.

I would suggest that accepting the principle of equal pay for work of equal value as the federal government has done might solve these problems. A male in the same type of job is not a prerequisite to the operation of equal value legislation and so it would benefit the large groups of women in structurally segregated jobs. Comparison with jobs held by males would not involve the need to match exactly in each of skill, effort, and responsibility, but would feature a balancing of attributes across these categories to determine the overall value to be given each job. Inherent in the enforcement of equal value legislation, is its relationship to a job evaluation system already in use by an employer, so that the adoption of an equal value standard should prompt union and company efforts to develop fair schemes voluntarily. Equal value legislation, enforced on the basis that group complaints and group remedies are to be encouraged, would be a powerful impetus toward the achievement of employment equality for women.

All of these proposals, of course, require one essential ingredient: the need for governments to become serious about the apparent commitment to equal pay and equal employment opportunity.

FOOTNOTES

1. The Robarts Library of the University of Toronto, the Legislative Library of the Province of Ontario, the Central Reference Library of the Metropolitan Toronto Library Board, and the Ministry of Labour Library, Government of Ontario. A study done as background to a survey of equal pay legislation by the Canadian Association of Administrators of Labour Legislation shows, however, that from 1974 to 1976, Alberta led all the other jurisdictions in the total amounts collected for equal pay violations. A sum of $1,417,303.12 was collected in September 1974 to September 1976 for 2,745 women. Manitoba, another jurisdiction for which Annual Report information was unavailable to the author, was second in the C.A.A.L.L. study, gathering $482,759.80 for 455 women, from October 1974 to October 1975. Saskatchewan and Ontario were third and fourth. See C.A.A.L.L., Women's Policy Committee, Report: Equal Pay in Canada (Prepared for the 36th Annual Conference of C.A.A.L.L., September 1977 under the direction of the Women's Bureau, Ontario Ministry of Labour), pp. 17-18.

2. British Columbia, Department of Labour, Annual Report for the year ended December 31, 1967, p. 34; and Annual Report for the year ended December 31, 1968, p. 32.

3. British Columbia, Department of Labour, Annual Report for the year ended December 31, 1954, p. 139; Annual Report for the year ended December 31, 1955, p. 129; and Annual Report for the year ended December 31, 1956, p. 136.

4. British Columbia, Department of Labour, Annual Report for the year ended December 31, 1970, pp. 29-31; Annual Report for the year ended December 31, 1971, pp. 26-28; Annual Report for the year ended December 31, 1972, pp. 27-30; Annual Report for the year ended December 31, 1973, p. 36; and Annual Report for the year ended December 31, 1975, p. 80. The handling of the complaints of the 342 female hospital workers is described in the 1973 Annual Report, at p. 37, and in note 29, below.

5. Ontario, Department of Labour, Annual Reports for the fiscal years ending March 31, 1952 (p. 35), 1953 (p. 44), 1954 (p. 83), 1955 (p. 52), 1956 (p. 44), 1957 (p. 47), 1958 (p. 51), 1959 (p. 55), 1960 (p. 55), 1961 (p. 63), 1962 (p. 59), 1963 (p. 59), 1964 (p. 51), 1965 (p. 2), 1966 (p. 32). Note that in 1951-52, the Act was in force for only three months.

6. Ontario, Department of Labour, Annual Report for the fiscal year ending March 31, 1967, p. 30.

7. Ontario, Department of Labour, Annual Report for the fiscal year ending March 31, 1968, p. 37.

8. The figures in the table are taken from Ontario, Ministry of Labour, Annual Reports for the fiscal years ending March 31, 1970 (Statistics section, p. 12); 1971 (Statistics section, p. 10); 1972 (p. 25); 1973 (p. 7); 1974 (p. 9), 1975 (p. 17), 1976 (p. 10), 1977 (p. 32).

9. Saskatchewan, Department of Labour, Annual Reports for the fiscal years ended March 31, 1954 - 1973. See, for notes regarding the Women's Bureau, the Annual Reports for the fiscal years ended March 31, 1965 (p. 46), 1966 (p. 47), 1968 (p. 66), 1969 (p. 27), 1970 (p. 53), 1972 (p. 56).

10. Saskatchewan, Department of Labour, Annual Reports for the fiscal years ended March 31, 1974 (p. 80), 1975 (p. 46), 1976 (p. 47).

11. Nova Scotia, Department of Labour, Annual Reports for the fiscal years ended March 31, 1957 - 1968. In the Annual Report for the year ended March 31, 1967, however, there are reports of a complaint of sex discrimination by a restaurant employee (p. 65) and a complaint by a female department store employee against her employer, possibly because of a retirement policy (p. 66). There is not enough information in the reports to identify the precise ground of either complaints. This lack of precision seems to lead more readily to an inference that they were not equal pay complaints; reference to an alleged violation of equal pay provisions could have - and indeed was in subsequent years - much more precise. At this time, legislation forbidding sex discrimination of any other type than "equal pay" violations was not in force in Nova Scotia.

12. Nova Scotia, Department of Labour, Annual Reports for the fiscal years ending March 31, 1969 (pp. 80-81), 1970 (p. 85), 1971 (p. 99), 1972 (p. 49), 1973 (p. 29), 1974 (p. 28), 1975 (p. 35), 1976 (p. 30).

13. Canada, Department of Labour, Annual Reports for the fiscal years ended March 31, 1957 (p. 20), 1958 (p. 22), 1959 (p. 24), 1960 (p. 22), 1961 (p. 22), 1962 (p. 26), 1963 (p. 14), 1964 (p. 14) 1965 (p. 87), 1966 (p. 58).

14. Statutes of Canada 1956, c. 38 (in force October 1, 1956).

15. Canada, Department of Labour, Annual Reports for the fiscal years ended March 31, 1967 (p. i), 1968 (p. v), 1969 (p. iii), 1970 (p. iii), 1971 (p. iii), 1972 (p. iii), 1973 (p. iv), 1974 (p. iv), 1975 (p. iv), 1976 (p. iv).

16. McLellan v. C.T.V. Television Network Ltd. (1975), 10 O.R. (2d) 107 (Ont. Co. Ct.)

17. A preliminary dispute about which legislative provisions applied to this case is reported at Re Bell Canada and Palmer (1974), 42 D.L.R. (3d) 1 (Federal Court of Appeal). The final court ruling is Re Harris et al. and Bell Canada (1975) D.L.R. (Fed. C.A.)

18. January 12, 1973.

19. American Enterprise Institute for Public Policy Research. Federal Energy Administration Regulation. Report of the Presidential Task Force. Paul McAvoy, ed. (Ford Administration Papers on Regulatory Reform) Washington, D.C., 1977. See page 95.

20. The history of these changes is traced in G.C.A. Cook and M. Eberts, "Policies Affecting Work", in G.C.A. Cook, ed., Opportunity for Choice (Ottawa, Information Canada, 1976). See pages 176-177 and notes 83-92 on p. 195.

21. (1976), 67 D.L.R. (3d) 635.

22. This task was begun in Cook and Eberts, op. cit. supra, note 20. The reader is also referred to the very valuable study of the equal pay legislation now in force in Canada cited in note 1, supra.

23. (1975) 62 D.L.R. (3d) 531 (Alta S.C.T.D.)

24. November, 1976; Nova Scotia Human Rights Commission Board of Inquiry.

25. Nova Scotia, Department of Labour, Annual Report for the year ending March 31, 1969, p. 2. The report of the case states simply: "Rather than contest the complainants' charges, the plant's management removed the female employees from the cutting line leaving only males in this type of employment."

26. Source of these figures is Cook and Eberts, op. cit. supra note 133, at page 200, updated with reference to The Human Rights Act, S.P.E.I. 1975, c. 72; The Human Rights Act, S.M. 1974, c. 65, The Employment Standards Act, R.S.M. 1970, C.E. 110, Charter of Human Rights and Freedoms, S. Que. 1975, c. 6, and The Canadian Human Rights Act, Stats. Can. 1977, c. 33.

27. In re complaints of Linda Jones, et al. (Newfoundland Human Rights Commission. January 5, 1971).

28. (1977), 74 D.L.R. (3d) 430 (Sask. Q.B.)

29. The award is described at British Columbia, Department of Labour, Annual Report for the fiscal year ended March 31, 1973, p. 37. The account states that the award was a breakthrough because the settlement did not go only to those women who could prove under the letter of the law that they were doing "substantially the same work" as men, but to women in segregated female occupations. The agreement also provided for the elimination of all forms of discrimination against female employees, whether in pay, training, or promotion opportunities.

30. Statutes of Alberta 1972, c. 2, as amended by S.A. 1973, c. 61, s. 9.

31. Report of the Hospital Inquiry Commission (November 8, 1974), p. 33. The report stated at p. 32 that between 1969 and 1974, seventeen investigations had taken place in Ontario hospitals, finding nine violations involving over 700 employees. The Commission agreed that enforcing equal pay legislation was difficult in this context because "pay differentials can often be established on the basis of fairly minor variations in duties" and testing whether such variations justify pay differentials is "currently a long case by case process".

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